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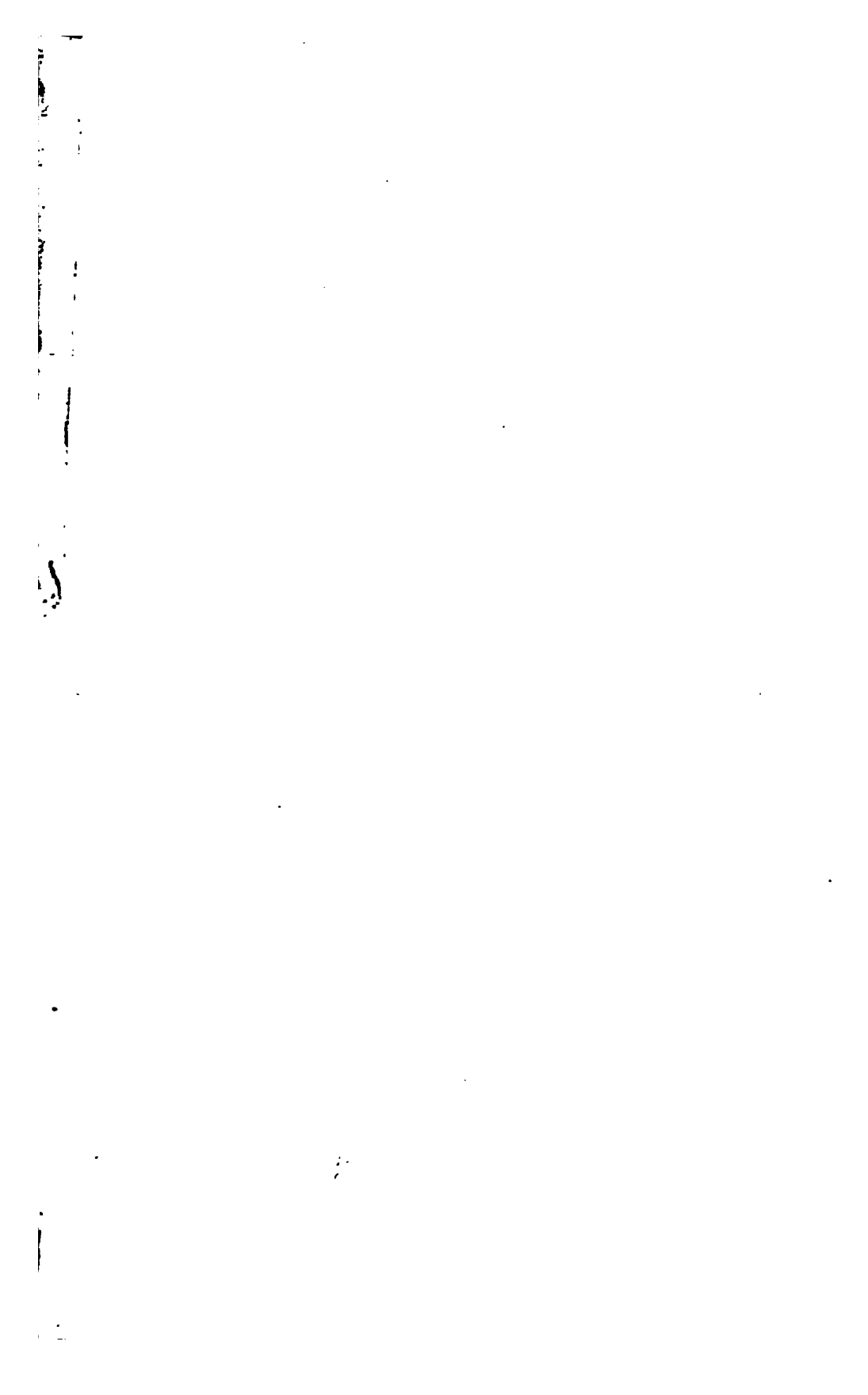
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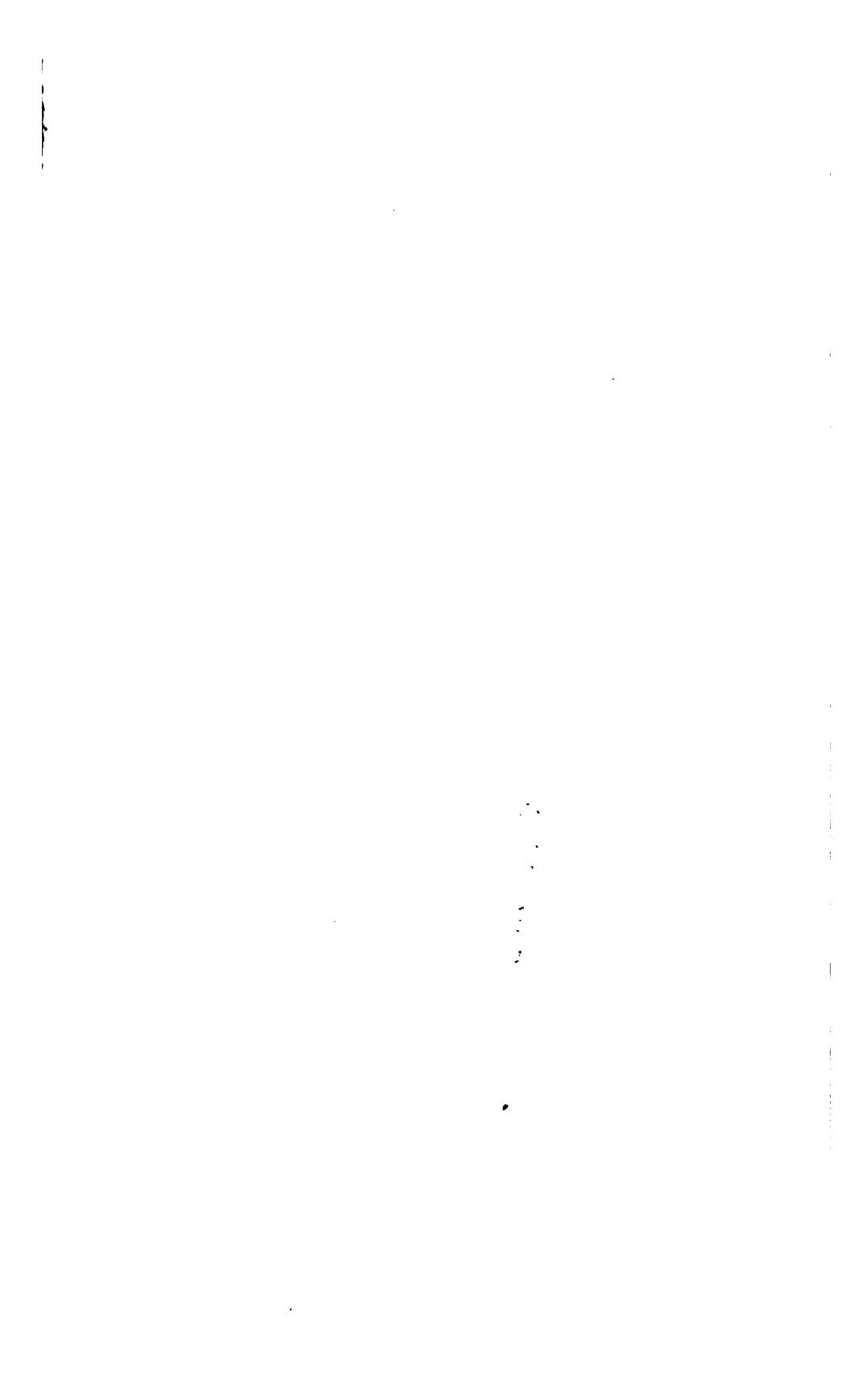
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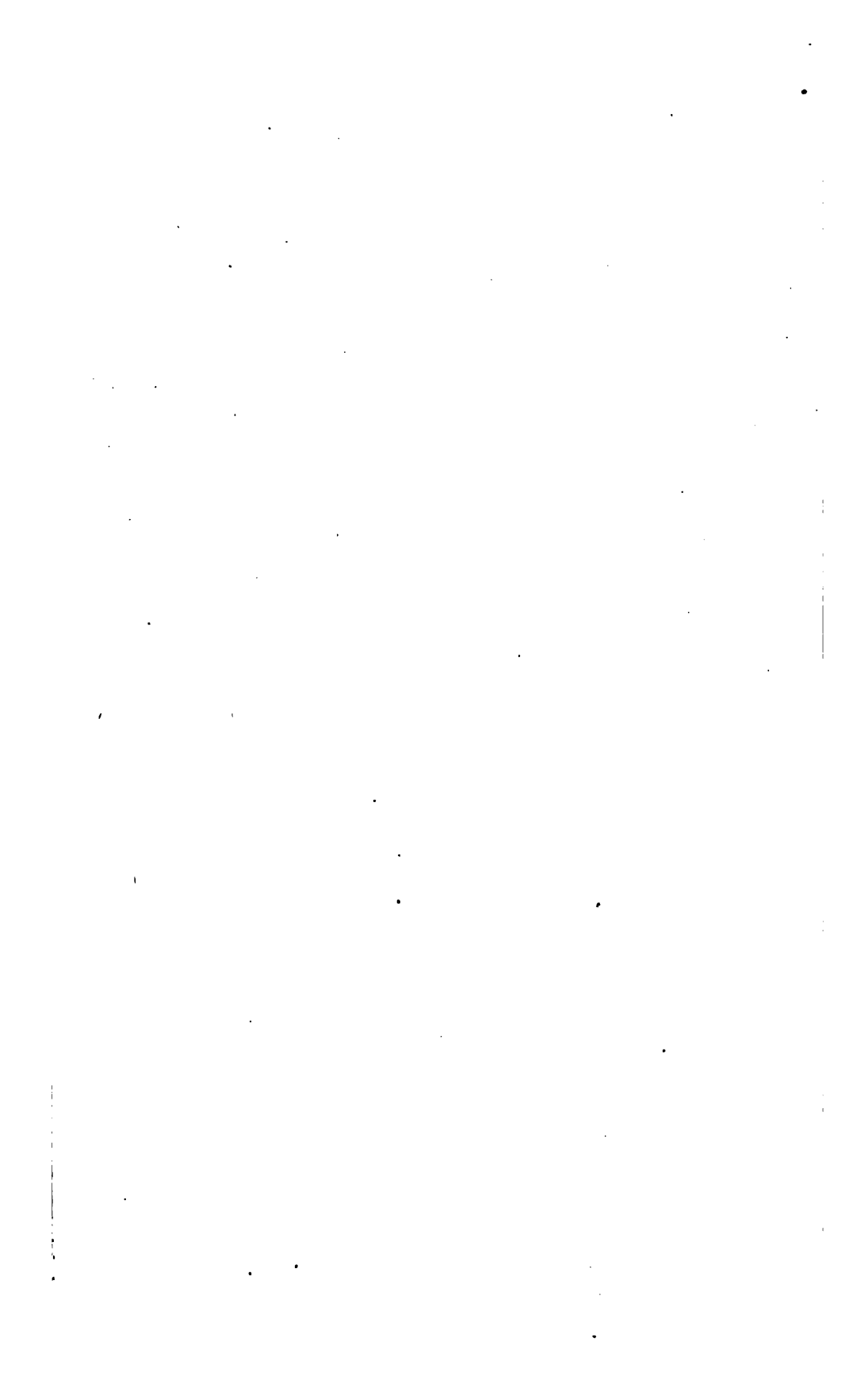
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OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 104,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1885.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM E. NIBLACK.*†

HON. GEORGE V. HOWK.†

HON. BYRON K. ELLIOTT.‡

HON. ALLEN ZOLLARS.†

HON. JOSEPH A. S. MITCHELL.§

*Chief Justice at the November Term, 1885.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 3d, 1881.

§Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1885, IN THE SEVEN-
TIETH YEAR OF THE STATE.

No. 12,094.

ALLEN v. KERSEY.

104	1
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104	1
166	53

REAL ESTATE.—Description.—In descriptions of real estate, monuments first control, then courses and distances, and lastly the designated quantity.

SAME.—Deed.—Intention of Parties.—When there is a contest between the parties as to what has passed by a deed, the circumstances under which it was executed, and the intention of the parties, ought to be considered.

SAME.—Covenants of Title.—Limitation of.—Covenants of title must be limited to the estate, as well as to the particular parcel of ground, intended to be conveyed, as evinced by the description in the deed, when applied to the property as it was situated at the time of the conveyance.

SAME.—Seizin.—Breach of Warranty.—K., while the owner of a lot, built two houses thereon, one of which was intentionally lapped over twenty inches upon the north half of said lot. He subsequently conveyed the whole lot to A. Afterwards A., believing that all the south house was situate upon the south half, conveyed said south half to C. and the north half back to K. By proceedings for that purpose against K. and A., C.'s deed was reformed so as to make it convey all the ground, including the twenty inches, upon which the south house stood. K. sued A. on his covenants of warranty to recover damages.

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Held, that K., having knowledge of all the facts at the time of taking his deed, and that C. was in possession of the south house and the ground upon which it stood, under claim of title, can not recover.

From the Marion Superior Court.

S. M. Shepard, for appellant.

H. Dailey, for appellee.

NIBLACK, C. J.—Complaint by Sarah E. Kersey, charging that, on the 8th day of May, 1880, Horace R. Allen, for a valuable consideration, conveyed to her, by a general warranty deed, the north half, or twenty-one (21) feet off the north side, of lot No. twenty-two (22), in McCarty's subdivision of out-lots one hundred and nineteen (119), and a part of one hundred and eighteen (118), in the city of Indianapolis; that at the time of the execution of said conveyance the said Allen did not have a good and indefeasible title, and was not lawfully seized of a strip of one foot and eight inches in width off the south side of the real estate described in said deed; that afterwards, on the 22d day of October, 1881, in a certain action in which one Ann M. Conklin was plaintiff, and the plaintiff herein and the said Horace R. Allen and others were defendants, the said Ann M. Conklin, by the consideration and judgment of the superior court of Marion county, recovered from her, the said Sarah E. Kersey, the plaintiff in this action, the said strip of ground, one foot and eight inches in width, upon the strength of an outstanding, pre-existing and superior title vested in her, the said Ann M. Conklin. Wherefore damages were demanded for the loss of said strip of ground and for expenses incurred in defending the action prosecuted as above for the recovery of the same.

Allen answered in three paragraphs: *First*. In general denial. *Second*. That in the year 1865, the plaintiff was the owner of lot No. twenty-two (22), described in the complaint; that while she was such owner she erected two houses on said lot, one on the north side, and the other on the south

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side thereof; that the plaintiff caused the house so erected on the south side of said lot to be placed or to lap over one foot and eight inches upon the north half of the same; that afterwards the plaintiff, acting in conjunction with her husband, Oliver Kersey, conveyed said lot, with the houses thereon, to him, the said Allen; that afterward he, the defendant Allen, sold and by deed conveyed the south half of said lot to Ann M. Conklin, believing at the time that all of the south house was situate upon said south half of such lot; that the said Ann M. Conklin immediately went into the possession of said south house, and the ground upon which it is situate, and has ever since so continued in possession of the same; that afterwards he, the said Allen, sold and conveyed the remainder of said lot, describing it as the north half, or twenty-one (21) feet off the north side thereof, to the plaintiff; that at the time of such sale and conveyance the plaintiff well knew that the south house lapped over one foot and eight inches upon the north half of such lot, and that the said Ann M. Conklin was in the possession of such south house and the ground upon which it stood, under a *bona fide* claim of title; that at that time he, the said Allen, was ignorant of the fact that the south house so lapped over onto the north half of the lot in question. Wherefore judgment for the defendant was demanded. *Third.* Setting up substantially the same facts in a different form, and the proceedings in the case of Ann M. Conklin against the plaintiff and others, referred to in the complaint, in estoppel of the action.

A demurrer was sustained to the second paragraph of the answer, and an issue was formed upon the third paragraph. The court below at special term made a finding for the plaintiff, assessing her damages at \$162.10, and rendered judgment accordingly. This judgment was afterwards affirmed at general term.

The record of the case of Ann M. Conklin against Mrs. Kersey and Allen and others was read in evidence at the trial.

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That record showed that case to have been an application by Ann M. Conklin to have the deed made by Allen and wife to her so corrected and reformed as to make it embrace all of the ground upon which the south house stood, upon the allegation that such was the intention of the parties when the deed was made, and that the deed in question had been so corrected and reformed as against Mrs. Kersey as well as Allen.

That record further showed that the court in that case made a special finding of the facts proven at the trial, which was in substantial accordance with the allegations of the second paragraph of the answer filed in this case, except that it stated rather more strongly, that when Mrs. Kersey built the south house, she intentionally lapped it over one foot and eight inches onto the north half of the lot, and that when she received the conveyance back to such north half from Allen and wife, she had full knowledge of the fact that Ann M. Conklin was in the actual possession of the south house and the ground upon which it was and is still situate, under a claim of title, and was exercising acts of ownership over both the house and such ground, and of all that pertained to the title of lot twenty-two (22) herein above described.

In view of all the circumstances under which it was made, that special finding was, and still continues to be, binding upon Mrs. Kersey, as to the condition of affairs existing at the time she received the conveyance from Allen and wife for the north half of the lot in question.

The recitals in a deed of conveyance as to the quantity of acres, or feet, which the land contains, which it assumes to convey, are not always conclusive as to the dimensions of the particular tract actually conveyed, or intended to be conveyed. In describing a tract of land, monuments have a controlling influence. Next to monuments courses and distances control. Lastly, in the absence of both monuments and courses and distances, the designated quantity will prevail. 3 Washb. Real Prop. (4th ed.) 407; *Simonton v. Thompson*, 55 Ind. 87.

Allen v. Kersey.

In determining how far the alleged quantity which a tract of land contains ought to control in its description, the context and other descriptive words ought to be taken into consideration. When there is a contest between the parties as to what has passed by a deed, the circumstances under which the deed was executed, and the consequent presumed intention of such parties, ought to be considered. 3 Washb. Real Prop. 384.

Covenants of title must by the same rule be limited to the estate as well as the particular parcel of ground intended to be conveyed, as evinced by the description in the deed, when applied to the property as it was situated at the time of the conveyance. Rawle Cov. of Title, 523, *et seq.*; 3 Washb. Real Prop. 491.

Mrs. Kersey having intentionally placed a part of the south house upon the north half of the lot, and having in this way contributed to bringing about the complications which gave rise to this suit, and having accepted the deed, upon the covenants of which this action is based, with full knowledge of the existence of these complications, we think the court below, at special term, erred in holding that the failure of the deed to convey to Mrs. Kersey, and to assure to her possession of, a full half of the lot, was a breach of the covenants in the deed. *John Hancock M. L. Ins. Co. v. Patterson*, 103 Ind. 582; *Kellogg v. Wood*, 4 Paige, 578.

All the evidence which might have been admitted under the second paragraph of the answer in this case, was admissible under the third paragraph. We have not for that reason examined the second paragraph of the answer with reference to its technical sufficiency in every respect upon demurrer.

The judgment at general term is reversed, with costs, and the cause remanded for further proceedings.

Filed Nov. 23, 1885.

 Burkett *et al.* v. Holman.

No. 12,265.

BURKETT ET AL. v. HOLMAN.

PRACTICE.—*When Defective Complaint Cured by Judgment.*—*Supreme Court.*—

Where the defects in a complaint are such as may be obviated by evidence on the trial, they will be held cured by the finding and judgment, when questioned for the first time by an assignment of error in the Supreme Court.

CHANGE OF JUDGE.—*Affidavit.*—*Practice.*—Under section 412, R. S. 1881, in any civil action, when the proper affidavit for a change of judge is made and filed by a party, the court, or the judge in vacation, has no discretion, but must grant the change.**SAME.**—*Proceedings Supplementary to Execution.*—“*Civil Action.*”—A proceeding supplementary to execution is such a civil action as entitles a party, upon a proper application, to a change of venue or judge.

From the Fulton Circuit Court.

M. R. Smith and *G. W. Holman*, for appellants.

J. Rowley, *M. A. Baker*, *M. L. Essick* and *O. F. Montgomery*, for appellee.

Howk, J.—In this case, the appellee, Holman, filed his verified complaint, in the court below, against the appellants Burkett, McCarter and Smith, under the provisions of section 819, R. S. 1881. This section is a literal re-enactment of section 522 of the civil code of 1852, and it contains provisions in relation to what were called, in that code, “*Proceedings Supplementary to Execution.*” In his verified complaint, the appellee alleged that he had recovered a judgment, before a justice of the peace of Fulton county, against the appellant Burkett, for \$122.10, and that an execution issued by the justice, on such judgment, to the proper constable, had been returned unsatisfied; that thereupon appellee caused a transcript to be made out, by such justice, of all the proceedings in such cause, which transcript was filed in the office of the clerk of the Fulton Circuit Court, and an execution was issued to the sheriff of Fulton county, which execution was returned wholly unsatisfied, no property of Burkett being found.

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Appellee further alleged, that appellant McCarter, a resident of Fulton county, was indebted to Burkett in the sum of \$1,000, and the appellant Smith was also indebted to Burkett, the amount of which indebtedness was unknown to appellee; which, with the amount already in the hands of Burkett, claimed by him as exempt from execution, exceeded the amount so exempt by law from execution. Wherefore, etc.

There was no demurrer filed to this complaint, but the sufficiency of the facts therein stated to constitute a cause of action is called in question here, by appellants' assignment, as error, that such complaint does not state sufficient facts. If the sufficiency of the complaint had been "tested by demurrer or motion to dismiss or strike out the same," in the circuit court, as is provided in section 822, R. S. 1881, it would seem to us that it was clearly insufficient for the following reasons: 1. Because it failed to show that the execution, issued by the justice, had been returned by the proper constable, endorsed "that no goods or chattels could be found sufficient to satisfy the judgment or a part thereof," or that the justice's certificate of such return by the constable had been filed and recorded with the transcript of the judgment, in the proper order-book, as required by section 614, R. S. 1881; 2. Because it was not alleged in such complaint, that before the issue of the execution to the sheriff of Fulton county, the appellee or his agent filed with the proper clerk "his affidavit that the judgment is unpaid in whole or in part, stating the amount due," as required by the same section 614; and 3. Because, in such complaint, the appellee did not allege that the judgment, or any part thereof, was due and unpaid. If these objections to the complaint had been presented at the proper time and in the proper manner, they would have been fatal, we think, to its sufficiency. But, after trial and judgment, and on appeal to this court, these objections to the complaint come too late; for they are such as might have been and, doubtless, were obviated by the evidence on the trial, and cured by the finding and judgment.

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Donellan v. Hardy, 57 Ind. 393; *Field v. Burton*, 71 Ind. 380; *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380.

The questions chiefly discussed by appellants' counsel, in their briefs of this cause, and upon which they seem to rely for the reversal of the judgment and orders of the court below, are such as arise under the alleged error of the court in overruling their motion for a new trial. In this motion, the first cause assigned for such new trial was an alleged error of the court in overruling appellants' motion for a change of judge. It is shown by a bill of exceptions appearing in the record, that, at the proper time, the appellants moved the court, upon affidavit filed, for a change of judge, upon the ground that they could not have a fair and impartial trial in this cause, "on account of the bias and prejudice of the judge before whom the said cause is pending." This motion was overruled by the court, the appellants excepted to the ruling at the time and filed their bill of exceptions, and they assigned such ruling as cause for a new trial, in their motion therefor. The question, therefore, is fairly saved in the record of this cause, and is properly presented here for our decision. Did the trial court err in refusing the appellants a change of judge, or, as it is inaptly called, "a change of venue" from the judge?

In section 412, R. S. 1881, it is thus provided: "The court in term, or the judge thereof in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes: * * * *

"*Seventh.* When either party shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending."

The language of this section of the civil code is mandatory, and there can be no doubt that, in any civil action, when the proper affidavit is made and filed by the proper party, at the proper time, the court in term, or the judge in vacation, before whom the cause is pending, has no discretion, but must

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grant the change of venue or change of judge. This is settled by many decisions of this court. *Krutz v. Griffith*, 68 Ind. 444; *Shoemaker v. Smith*, 74 Ind. 71; *Heshion v. Pressley*, 80 Ind. 490.

In the early case, under the code, of *Witter v. Taylor*, 7 Ind. 110, the court said: "Applications for change of venue, in civil cases, are not addressed to the discretion of the court. Like surety to keep the peace, they are measured more by the feelings of the party making the application, than by any distinctive features which the court might recognize as a just ground of apprehension. If the affidavit is in substantial conformity to the statute, the change must be granted. The statute is explicit." *Shaw v. Hamilton*, 10 Ind. 182; *Shattuck v. Myers*, 13 Ind. 46; *Goldsby v. State*, 18 Ind. 147.

We do not understand that appellee's learned counsel, in their brief of this cause, controvert the law as we have stated it, in relation to a change of judge or change of venue, in a civil action. But counsel claim that such a suit as the one at bar is not a "civil action" within the meaning of the sections of the civil code providing for a change of venue or a change of judge. Counsel further claim that such a suit as the one now before us is a special proceeding, to which the general provisions of the civil code are not applicable, except as expressly made so, and that, in such a proceeding, no provision whatever is made, in the code or elsewhere, for either a change of venue or a change of judge. Therefore, it is claimed by appellee's counsel, that the appellants' motion for a change of judge, or for a change of venue from the judge, was unwarranted and unauthorized by law, and that no available error was committed by the court in overruling such motion, or in refusing such change of judge or change of venue. We are not inclined, however, to adopt this view of the question now under consideration.

In the first section of the civil code of 1881, section 249, R. S. 1881, it is thus provided: "There shall be no distinction in pleading and practice between actions at law and suits .

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in equity ; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."

On the 19th day of September, 1881, the civil code of 1881 took effect, and superseded and, in effect, repealed the civil code of 1852, which had been in force since May 6th, 1853. Under the old code of 1852, what appellee's counsel denominate a "special proceeding" was contemplated and provided for. Thus, in section 682 of the old code, it was thus provided: "The party procuring a special proceeding shall be known as the plaintiff, and the adverse party as the defendant." 2 R. S. 1876, p. 281. Even this slight reference to, or authority for, what is called a special proceeding, is nowhere to be found in the civil code of 1881.

We have said that section 819, R. S. 1881, under which this suit was instituted, is a literal re-enactment of section 522 of the civil code of 1852. So, also, we may say that sections 820 and 821 of the civil code of 1881 are substantially re-enactments of sections 523 and 524 of the old code of 1852. These sections 522, 523 and 524 of the civil code of 1852 have often been examined and considered by this court; and, in regard to their provisions, there is some contrariety of opinion in our decisions, but not upon the questions presented in this case.

In *Toledo, etc., R. W. Co. v. Howes*, 68 Ind. 458, the court said: "But we are clearly of the opinion, that in proceedings supplementary to execution, instituted under section 522 of the code, against the execution defendant and either his debtor or the custodian of his property, the answers of the defendants under oath, in denial either of the possession of such property or of the existence of the alleged indebtedness, are not final and conclusive upon any question of fact involved therein; but, as to any such question, pleadings may be filed, and issues, either of law or of fact, may be joined by and between the plaintiff and the defendants or either of them, or by and between the defendants; and such issues so joined may

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be heard, tried and determined in the same manner as other issues of law or fact, in other civil actions or proceedings."

So, in *Kissell v. Anderson*, 73 Ind. 485, after referring to the decision in *Toledo, etc., R. W. Co. v. Howes, supra*, the court said: "The effect of this decision is to place proceedings supplementary to execution substantially on the same footing as any other civil action; and, therefore, if any party to such proceedings may wish to take the opinion of this court, in regard to any supposed error of the trial court therein, we are of the opinion that such error must be saved and presented in and by the record, in the same manner as in any other civil action." To the same effect, substantially, are the following cases: *McMahan v. Works*, 72 Ind. 19; *Abell v. Riddle*, 75 Ind. 345; *Johnson v. Jones*, 79 Ind. 141, on p. 147; *Fowler v. Griffin*, 83 Ind. 297.

In section 822, R. S. 1881, it is provided as follows: "Costs shall be awarded and taxed in this proceeding as in other cases; and all proceedings under this act, after the order has been made requiring parties to appear and answer, shall be summary, without further pleadings, upon the oral examination and testimony of parties and witnesses. But the sufficiency of the order and of the affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out the same."

All of this section 822, except so much thereof as relates to the award and taxation of costs, is new legislation, that is, it is not to be found in the old code of 1852, but appears for the first time in the civil code of 1881. So much of the section as relates to costs is a literal re-enactment of section 525 in the civil code of 1852. 2 R. S. 1876, p. 232. The new legislation in such section is what may be called a legislative overruling, by implication, of the decisions of this court, in *Toledo, etc., R. W. Co. v. Howes, supra*, and the cases which follow it. That is, contrary to the decisions of this court in the cases cited, that pleadings might be filed and issues of law

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or fact formed, in such suits as the one at bar, section 822 provides, in effect, that there shall be no pleadings filed in such cases, except that the sufficiency of the plaintiff's affidavit or verified complaint "may be tested by demurrer, or motion to dismiss or strike out the same." The reasons for this new legislation are not obvious, and its policy might well be doubted; but, of course, it is a proper subject of legislation, and, in such a case, the policy of the law is not a question for the courts. We are not inclined, however, to extend the provisions of section 822, by construction, beyond the plain import of the language used therein. By the terms of the section, the proceedings in such a suit as this are to be "summary," in the sense that they are to be "without further pleadings," but in no other sense. Such a suit is what the code denominates a "civil action," and certainly there is nothing in section 822, or in any other section of the civil code of 1881, to indicate that the proceedings in such suit are so "summary" that a party may not, upon a proper application made at the proper time, obtain a change of venue or a change of judge therein.

In the case in hand, we are of opinion that the trial court erred in overruling the appellants' motion for a change of judge, or a change of venue from the judge, and that, for this error of law, their motion for a new trial ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Nov. 23, 1885.

The Chicago, St. Louis and Pittsburgh Railroad Company v. Bills.

No. 11,702.

THE CHICAGO, ST. LOUIS AND PITTSBURGH RAILROAD
COMPANY v. BILLS.

RAILROAD.—*Ejecting Passenger from Train.*—*Liability of Company.*—A railroad company is liable to one who has been ejected with unnecessary force from a train by the conductor, although the latter had a right to expel such person and to use reasonable force for such purpose.

SAME.—*Degree of Force.*—The degree of force is not to be determined by results only, but other facts, such as the resistance made by the passenger, must be taken into consideration.

SAME.—*Complaint.*—Where a complaint proceeds upon the theory that unnecessary force was used in ejecting the plaintiff, it must state such facts as show that the act of the conductor was unlawful, *i. e.*, by alleging facts showing that the force employed was unnecessary.

SAME.—*Wrongful Expulsion.*—An action may be maintained against a railroad company by one who has been wrongfully ejected from a train, without regard to the degree of force used in the expulsion.

SAME.—*Stopping at Stations.*—*Rules of Company.*—*Rights of Passengers.*—A passenger has no right on a train which, under the rules of the company, does not stop at the station for which he purchased a ticket.

SAME.—*Complaint.*—A complaint by a ticket-holder for wrongful expulsion must aver that, under the rules of the company, the train on which he took passage should stop at the station named on his ticket.

PLEADING.—*Theory of Complaint.*—A complaint must proceed upon a distinct and definite theory, and upon that theory the case must stand or fall.

From the Madison Circuit Court.

N. O. Ross, for appellant.

M. S. Robinson, J. W. Lovett and C. D. Thompson, for appellee.

ELLIOTT, J.—The appellee alleges in his complaint, that the appellant owns and operates a line of railroad extending through the counties of Madison and Tipton, in this State, and that it is engaged in the business of transporting freight and passengers for hire; that Elwood, in Madison county, and Curtisville, in Tipton county, are each stations at which passengers and freight are received and discharged; that in September, 1883, the appellee was engaged in the business

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of buying and selling live-stock, and had in the pens of the appellant at Curtisville "forty head of cattle," ready for shipment; that he desired to go from Elwood to Curtisville for the purpose of shipping the cattle, and bought from the appellant's agent at the former station a ticket for Curtisville; that he entered one of the passenger trains of the appellant, presented his ticket to the conductor, who informed him that the train would not stop at Curtisville; that the conductor refused to receive the ticket and ejected the appellee from the train. There are allegations as to the manner in which the conductor ejected the appellee, of which we shall speak at another place.

The appellant's counsel assumes that the complaint is constructed upon the theory that the appellee was wrongfully ejected from the train, and, proceeding upon this assumption, asserts that the complaint is bad because it does not aver that the rules of the company provided that the train entered by the appellee should stop at the station for which he took passage. The appellee's counsel contest the assumption of appellant, and affirm that the theory upon which the complaint proceeds is, that the conductor used unnecessary force in ejecting the appellee from the train.

We have no doubt that the law is, that if the conductor uses unnecessary force in ejecting a passenger, the company is liable, although the conductor may have a right to eject him and to employ reasonable force to expel him from the train. *McClure v. Philadelphia, etc., R. R. Co.*, 34 Md. 532 (6 Am. R. 345); *Shedd v. Troy, etc., R. R. Co.*, 40 Vt. 88. This is but the application of an old principle, old as the law itself, to a modern instance; for it has ever been the law that no man has a right to employ unnecessary force in doing any act. While it is true that a conductor may not use unnecessary force to eject a passenger, it is also true that he may employ reasonable force to accomplish that object. The degree of force is determined, not by results simply, for other facts must be taken into consideration, and chief among such

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facts is the resistance made by the passenger. It is obvious that a passenger who makes no resistance can not lawfully be treated like one who does resist the commands and efforts of the conductor. Resistance may make great force necessary and reasonable; while acquiescence in the directions of the conductor may render any degree of force unnecessary and unreasonable. If words will accomplish the object, force should not be employed.

The use of unnecessary force is unlawful. He who constructs a complaint upon the theory that unnecessary force was used in expelling a passenger from a railroad train, proceeds upon the ground that an unlawful act was committed. One who bases his cause of action upon the performance of an unlawful act must affirmatively show it to be unlawful; the appellee does base his cause of action upon the performance of an unlawful act, and it therefore devolves upon him to show that it was unlawful. Acts can not be shown to be unlawful by epithets; facts alone can have this effect. The result of these principles is, that this complaint can not be good upon the theory assumed by the appellee unless it states such facts as show that the act of the appellant's conductor was unlawful. In order to show that the act was unlawful, it is essential to state facts showing that unnecessary force was employed in ejecting the appellee from the train. In our opinion no such facts are stated. These are the averments of the complaint upon this point: "That the conductor stopped the train and put the plaintiff off the train, beside the road, about one mile from Elwood. And the plaintiff further alleges that he is so afflicted with a disease called hernia, that he is compelled to wear a truss, and that, in putting him off the train, the conductor used so much force and violence that he broke his truss and rendered it entirely useless, and the conductor also threw him violently to the ground and greatly bruised and wounded him." These allegations do show that force was used, but they are far from showing that it was unnecessary. For anything that appears,

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the conductor may have used the least possible degree of force necessary to expel the appellee from the train. It may be that the resistance of the appellee made necessary all the force that the conductor used. We can not presume that the conductor did an unlawful thing; on the contrary, the presumption is that his act was lawful. A plaintiff can not make a cause of action upon an unlawful act, without averring facts showing it to be unlawful, for the presumption is against him. We could not hold the complaint good even if we agreed with appellee's counsel in their view of the theory upon which it proceeds.

It is essential to the formation of issues and to the intelligent and just trial of causes, that a complaint should proceed upon a distinct and definite theory. It would violate all rules of pleading to permit a complaint to be construed as best suited the exigencies of the case; to allow such a course of procedure would produce uncertainty and confusion, and materially trench upon the right of the defendant to be informed of the issue he is required to meet. The rule is, that the complaint must proceed on a distinct and definite theory, and upon that theory the case must stand or fall. Many times our own, and other courts, have asserted and enforced this rule. *Bremmerman v. Jennings*, 101 Ind. 253, and authorities cited; *Mescall v. Tully*, 91 Ind. 96, and authorities cited. We are clear that the complaint before us, judged, as it must be, by its general scope, does proceed upon the theory that the appellee is entitled to recover because he was wrongfully ejected from the appellant's train.

We adopt the appellant's construction of the complaint, and will examine its sufficiency upon the assumption that it seeks a recovery on the ground that the appellee was wrongfully ejected from the appellant's train by its conductor. If the appellee was wrongfully ejected, then the complaint is good irrespective of the degree of force used in putting him off; for the law is well settled that an action may be maintained for the wrongful expulsion of a passenger. The

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pivotal question in such case is, was the passenger rightfully on the train? Upon this question the authorities give an answer against the appellee, for it is settled that the passenger has no right on a train which, under the rules of the company, does not stop at the station for which he purchased a ticket. In discussing a case of this character, the Supreme Court of Illinois said: "In such a case, the passenger is in the wrong, and has no right to insist that he should be safely put off at the point he desires, or be carried through without charge." *Chicago, etc., R. R. Co. v. Randolph*, 53 Ill. 510 (5 Am. R. 60). In *Beauchamp v. International, etc., R. W. Co.*, 56 Texas, 239 (9 Am. & Eng. R. R. Cases, 307), a like principle is declared, and it was said: "The plaintiff being the actor, the burden devolved upon him to make out a case of liability arising from contract express or implied."

It was held in *Lake Shore, etc., R. R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340, that "A passenger wrongfully on a railway train can recover no damages for his removal and exclusion therefrom except for needless violence." The decisions of this court assert the same doctrine as the cases cited. *Pittsburgh, etc., R. W. Co. v. Nuzum*, 50 Ind. 141 (19 Am. R. 703); *Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Ohio, etc., R. W. Co. v. Hatton*, 60 Ind. 12; *Ohio, etc., R. W. Co. v. Swarthout*, 67 Ind. 567 (33 Am. R. 104); *Indianapolis, etc., R. R. Co. v. Kennedy*, 77 Ind. 507. As it is incumbent upon the plaintiff in an action of this kind to show that he was rightfully on the train from which he was removed, it is necessary for him to aver in his complaint, that the rules of the company provided that the train on which he took passage should stop at the station named on his ticket. A recent writer says: "In an action by the passenger, against the company, to recover damages for carrying him beyond his destination named on the ticket, the complaint should aver that the train on which he was so carried was one which, under the regulations of the company, should have stopped

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at that station." 2 Wood Railway Law, 1415. The principle in the case in hand, and in those referred to by the author quoted, is substantially the same and is so recognized in *Ohio, etc., R. W. Co. v. Swarthout, supra.*

The trial court erred in overruling the demurrer to the complaint, and the judgment is reversed.

Filed Nov. 23, 1885.

No. 12,320.

POWELL v. POWELL.

DIVORCE.—*To what Extent Proceeding is Special.*—Divorce proceedings are so far special as to allow all the provisions of the divorce act to have their full force, unaffected by the civil code.

SAME.—*To what Extent Code Applies.*—"Civil Cases" and "Civil Actions."—*Pleading and Practice.*—Divorce cases, having been of equitable cognizance before the adoption of the Constitution, are not included in the term "civil cases," as used in the Bill of Rights; but under section 1 of the civil code (being section 249, R. S. 1881), they are "civil actions" in such a sense that the rules of pleading and practice therein provided will apply, except to the extent that a different procedure may be provided in the divorce act, and to the extent that it may be apparent that the Legislature intended otherwise.

SAME.—*Change of Judge.*—*Case Criticised.*—A divorce proceeding is a civil action in such a sense as entitles a party thereto; upon filing the proper affidavit, under section 412, R. S. 1881, to a change from the judge on the ground of bias and prejudice. *Musselman v. Musselman*, 44 Ind. 107, criticised.

CHANGE OF VENUE.—*Appointment of Special Judge.*—*Waiver of Irregularity.*—*Vacation of Judgment.*—One who does not object to the granting of a change of venue nor to the appointment and service of a special judge, can not afterwards maintain an action to vacate the judgment on the ground that such change and the appointment of the special judge were without authority.

From the Gibson Circuit Court.

L. C. Embree, for appellant.

J. E. McCullough and *J. H. Miller*, for appellee.

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ZOLLARS, J.—In April, 1882, the appellee, Doctor G. Powell, filed in the Gibson Circuit Court a petition for a divorce from appellant, and for the custody of their children. In May following, appellee filed an answer in general denial. On the same day, appellant filed an affidavit for a change of venue, on the ground of the alleged bias and prejudice of the judge. This motion was sustained on the 28th day of August, 1882, and a change from the judge having been granted in four other cases, the judge, on that day, by a regular and written appointment, appointed Hon. Alex. Gilchrist, a disinterested attorney, to try all of said causes, naming them. The regular judge of the court was not interested in the cause, was not of kin to the parties, and had not been of counsel in the cause. Mr. Gilchrist took the proper oath, which, with his appointment, was entered upon the records of the court.

On the 30th day of the same month, the case of Doctor G. Powell against appellant was tried by the special judge, and a decree was rendered and entered, divorcing the plaintiff from appellant, and giving to him the care and custody of the children. No objections of any kind were made by appellant, either to the filing of the affidavit for a change of judge, the granting of the same, the appointment of the special judge, or the trial of the case by him. No objection was made to the decree, nor was there any motion for a new trial.

That decree stood unchallenged until the commencement of this action, on the 10th day of January, 1884, and until after appellee had remarried. This action is to vacate and set aside that decree, on the sole ground that it was, and is, absolutely null and void.

The position of appellant's learned counsel is, that a divorce proceeding is not a civil action, in any sense, but a special proceeding; that the provisions of the civil code do not apply to it; that as the divorce act has no provision upon the subject of a change of venue, there can be no change from the judge on account of his bias and prejudice, and that, therefore, the change above mentioned, and the appointment

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of the special judge, were without authority, and the whole proceeding, including the final judgment, were and are null and void, and may be disregarded whenever and however they may come in question.

This contention can not be maintained, for at least two good and sufficient reasons. In the first place, we think, that a proceeding for a divorce is, at least, in such a sense and to such an extent a civil action, that the provision of the civil code for changing the venue on account of the bias and prejudice of the judge is applicable. Section 1 of the present code, which is substantially the same as the code of 1852, provides as follows: "There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." R. S. 1881, section 249.

The holdings in this State have been that a jury could not, and can not, be demanded in a divorce case. These holdings are not placed upon the ground that the proceeding is a special proceeding, and not a civil action within the above provision of the code, but upon the ground that the statutes providing for divorces did not, and do not, contemplate a trial by jury, but by the court. Upon that ground, the holdings are clearly correct. See *Lewis v. Lewis*, 9 Ind. 105. In this case, it was said: "The rule of procedure in cases for divorce, obviously contemplates a trial of the cause by the court." Upon this case are based the subsequent cases holding that a jury can not be demanded in the trial of a divorce case. See *Morse v. Morse*, 25 Ind. 156; *Leffel v. Leffel*, 35 Ind. 76; *Musselman v. Musselman*, 44 Ind. 106.

Section 20 of the bill of rights in our Constitution provides, that "In all civil cases, the right of trial by jury shall remain inviolate." We do not now recollect that the question has ever been made or decided by this court, as to whether or not this provision guarantees the right of trial by jury in

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a divorce case. Clearly it does not. It has been many times decided by this court, that the above constitutional provision covers only such cases as were known as "civil cases" before and at the time the Constitution was adopted. "Civil cases," as used in the Constitution, therefore, do not include cases in equity or special statutory proceedings, and, therefore, in such cases, the Legislature may provide for their trial by the court without a jury. *Lake v. Lake*, 99 Ind. 339; *Miller v. Evansville Nat'l Bank*, 99 Ind. 272; *Redinbo v. Fretz*, 99 Ind. 458; *Israel v. Jackson*, 93 Ind. 543; *Pence v. Garrison*, 93 Ind. 345; *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487; *Carmichael v. Adams*, 91 Ind. 526; *Helm v. First Nat'l Bank of Huntington*, 91 Ind. 44; *Anderson v. Caldwell*, 91 Ind. 451 (46 Am. R. 613); *Evans v. Nealis*, 87 Ind. 262; *Hendricks v. Frank*, 86 Ind. 278.

The Legislature can not abridge the right of trial by jury as guaranteed by the above provision of the Constitution, but it has been held that it may enlarge that right, and, in effect, that the term "civil action," as used in the code of 1852, was broader than the term "civil cases," as used in the Constitution, and that under that code many cases were triable by jury which would not have been but for the code. *Hopkins v. Greensburg, etc., T. P. Co.*, 46 Ind. 187; *Anderson v. Caldwell, supra*; *Pence v. Garrison, supra*; *Redinbo v. Fretz, supra*. The code of 1881, of course, brings us back to the Constitution to determine what cases are now triable by jury. And so the ditch law, and perhaps other statutes which we do not now call to mind, dispense with a jury trial. We cite the above cases to show that they were not decided upon the ground that a divorce proceeding is in no sense a civil action under the code, and that they do not so hold, and for the reason that they lend support to the proposition, that as to what are civil actions, the code is broader than the above section of the Constitution.

There is a line of cases, however, in which divorce cases have been spoken of as special proceedings, and in which it

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has been held that they are not civil actions in such a sense that all of the provisions of the civil code are applicable thereto. These cases had their origin with the case of *McJunkin v. McJunkin*, 3 Ind. 30, which was decided before the enactment of the code of 1852. It was provided in R. S. 1843, p. 602, section 45, that the practice and proceedings in divorce cases should be the same as in other cases in chancery, except as otherwise provided in the divorce act. It was provided in the chapter in relation to suits and proceedings in chancery, that decrees rendered without notice, other than by publication, might be opened within five years to let in a defence, etc., and that before any decree should be opened, notice should be given to the original plaintiff, his heirs, devisees, executors, or administrators, etc. R. S. 1843, p. 847, sections 98, 99. These provisions about giving notice to heirs, etc., and other considerations stated, together with the serious consequences that might result from opening divorce decrees after so long a time, led the court to think, and to hold, in *McJunkin v. McJunkin*, *supra*, that the above section 44 was not intended to include sections 98 and 99 above. Moving upon the theory that serious consequences might result from opening decrees of divorce after the lapse of years, the Legislature, in 1852, excepted such decrees from the statute providing that judgments taken upon notice by publication might be opened within five years. 2 G. & H., p. 66, section 43; 2 R. S. 1876, p. 52. And in furtherance of the same policy, it was enacted that no complaint should be filed for a review of a judgment of divorce. 2 G. & H., p. 279, section 586; 2 R. S. 1876, p. 247, section 586; R. S. 1881, section 615.

Of course, with these statutes in force, there can not be a review of a judgment and decree of divorce. So it has been held. The holdings rest upon the above statutes, and not upon the ground that the proceeding for a divorce is so absolutely special that no provision of the civil code is applicable thereto. See *Woolley v. Woolley*, 12 Ind. 663; *Mc-*

Quigg v. McQuigg, 13 Ind. 294; *Willman v. Willman*, 57 Ind. 500.

It was further held in the case of *Woolley v. Woolley*, *supra*, that it was not in accordance with the former usages, practice and legislation in this State, to disturb, for any reason, judgments or decrees for divorce. As to whether any provisions of the civil code, aside from that for the review of judgments, would be applied in divorce proceedings, was not decided.

The ruling in the case of *McQuigg v. McQuigg*, *supra*, is the same in effect as the case of *Woolley v. Woolley*, *supra*, but goes to the extent of holding that a decree of divorce can not be set aside for any cause, not even for fraud. Here, again, nothing is said as to whether or not the civil code applies to such a proceeding, further than to cite the statute which forbids a review of judgments and decrees of divorce.

It is proper to state here that so far as the cases of *Woolley v. Woolley*, *supra*, and *McQuigg v. McQuigg*, *supra*, hold that decrees of divorce can not be set aside for fraud upon the court, they have been overruled by the case of *Earle v. Earle*, 91 Ind. 27.

In the case of *McQuigg v. McQuigg*, *supra*, it was said: "The policy of our State seems to have been, and to still be, against disturbing divorces granted. This has been induced by a consideration of the consequences necessarily incident to an opposite policy."

This is a correct statement, and announces a reasonable and salutary policy. It has always been recognized and enforced. It was recognized in the case of *Earle v. Earle*, *supra*. It has been the most important consideration in all the cases where this court has declined to apply any provision of the civil code to divorce proceedings. Provisions of that code will not be applied to divorce proceedings where any legislative intent is apparent that they should not be so applied, and where the result would be to open up decrees, and thus bring about the evil consequences that might result.

The case of *Ewing v. Ewing*, 24 Ind. 468, upon which ap-

pellant mainly relies, and upon which subsequent and like cases rest, is based in the main upon the considerations above stated.

It was held in that case that section 99 of the code of 1852, 2 R. S. 1876, p. 82 (R. S. 1881, section 396), which provided for relieving a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and section 356 of that code, 2 R. S. 1876, p. 183 (R. S. 1881, section 563), which provided for the granting of a new trial within one year, on cause shown, did not apply to decrees of divorce. It was argued by counsel in that case, that a proceeding for divorce is not a "civil action" within the meaning of the code, but a special proceeding, and that, hence, the above provisions of the code were not applicable. In answer to that argument the court said: "But whether counsel are, or are not, correct, it is clear to our minds that the proceeding for divorce is so far special as to allow all the provisions of the divorce act to have their full force and effect, unaffected by the code." That is undoubtedly correct, because, when a provision or course of procedure is found in the divorce act, it is a clear manifestation of a legislative intention that it, and not the civil code, shall govern and be followed. Especially is this so, when the provision in the divorce act has any reference to the stability or opening of decrees of divorce. When that case arose, and at the time it was decided, there was a provision in the divorce act that parties against whom a judgment of divorce had been, or might be rendered, without other notice than publication in a newspaper, might have the same opened at any time so far as related to the care, support and custody of the children, and within two years after the rendition of such a judgment, upon such a notice, might have the same opened, and be allowed to defend, so far as the same related to the allowance of alimony and the disposition of property. Specific provision was also made as to the kind of notice that should be given of an application to so open the judgment, etc. The section contained a proviso that the

dissolution of the marriage contract should in no case be set aside under the provisions of the act. 2 G. & H., p. 349, section 7.

This section of the act is a very clear manifestation of the legislative intention, that the remedy and procedure therein provided should be exclusive, and is a plain declaration and enactment of the general policy of the State, that decrees of divorce should not be opened or vacated, except, of course, on appeal or for fraud, as ruled in the case of *Earle v. Earle*, *supra*. It is very plain, therefore, that the provisions of the civil code would not be allowed to overthrow this provision of the divorce act. This provision was set out in the opinion in *Ewing v. Ewing*, *supra*, and it was held that the history of the legislation, and our judicial decisions, demonstrated that it was not the intention of the Legislature to embrace divorce cases in sections 99 and 356 of the code of 1852. As we have said, it was upon these considerations, mainly, that the decision turned. In the course of the opinion it was said: "It might be enough for us to say that neither of these sections (99 and 356) apply, in terms, to divorce cases, and are only applicable to 'civil actions' under the code; but the history of our judicial decisions," etc. This should be taken in connection with and limited by what had been before said, that the proceeding for divorce is so far special as to allow all the provisions of the divorce act to have full force and effect, unaffected by the code. The case is not authority for saying that a proceeding for divorce is in no sense a civil action under the code, and that hence no provision of that code, is applicable in the procedure.

In the case of *Morse v. Morse*, 25 Ind. 156, in speaking of interrogatories which had been submitted, the judge delivering the opinion of the court, on page 163, said: "But in *Ewing v. Ewing*, 24 Ind. 468, this court held that the provisions of the statute authorizing divorces prescribed the rules of practice in those cases, and that they are not governed by the code." This, we think, states the holding in the *Ewing* case

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broad than it was. The statement, however, was not intended to be, and is not, authority for extending the holding in that case.

In the case of *Musselman v. Musselman*, 44 Ind. 106, in passing upon the question as to whether or not, in a divorce case, either party might have a change of venue from the county, BUSKIRK, J., said: "The solution of this question depends upon whether a proceeding for a divorce is a civil action within the meaning of section 207 of the code, 2 G. & H. 154, and whether a party in an action for divorce is entitled to a trial by jury as a matter of right. Section 207 of the code provides for a change of venue in a civil action." It was decided by this court, in *Ewing v. Ewing*, 24 Ind. 468, that a proceeding for a divorce was a special proceeding, and was not a civil action within the meaning of the code." Upon this statement, and upon the ground that neither party could demand a trial by jury, it was held that the trial court correctly overruled the motion to change the venue from the county, and that the fact that neither party was entitled to a trial by jury, was a sufficient reason for overruling the motion for a change of venue from the county. Here again, the statement of the holding in the Ewing case is too broad. And here again, the statement in relation thereto is not to be regarded as enlarging that holding. Nothing was held in the case of *Eastes v. Eastes*, 79 Ind. 363, except that section 315, R. S. 1881, in relation to endorsing the return day upon the complaint, does not apply to divorce cases, because the divorce act itself provides for the time of trial, etc., in divorce cases.

The above cases constitute the sum of the holdings upon the question as to whether or not a divorce case is a special proceeding or a civil action under the code. They do not hold that such a case is wholly a special proceeding; nor do they hold that it is in no sense a civil action under the code. They do hold, and correctly, that where the procedure is prescribed in the divorce act, that should be pursued, and not the civil code; and that so far as a procedure is provided in

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that act, it may be called a special proceeding. They further hold that where it is apparent that the Legislature intended that certain sections of the civil code should not apply in divorce cases, they will not be so applied, and especially, if the result would be to open the decree.

In the case of *Musselman v. Musselman*, *supra*, it was only necessary to hold that the section of the civil code in relation to changing the venue from the county did not apply to divorce cases, because the trial was not to be by jury. The language used in the opinion, however, is broad enough, unless restricted to the exact case before the court, to make a holding that in no case is the section of the civil code in relation to changing the venue applicable in divorce cases. In that case, however, there had been a change from the judge.

Section 207 of the code of 1852, mentioned in that case, like section 255 of the code of 1881, R. S. 1881, section 412, provided for a change from the judge and from the county. There is no provision in the divorce act for a change from the judge.

Unless section 255, *supra*, of the civil code is applicable to divorce cases, there can be no such change, no matter how much biased and prejudiced the judge may be. It has never been held in any case, involving the single and specific question, that the civil code would not apply to a divorce case, so as to entitle a party to a change from the judge on account of his prejudice and bias. It has not been so held in any case, unless the holding in the case of *Musselman v. Musselman*, *supra*, is to be regarded as such a holding. If it be so regarded, it is to that extent incorrect.

The first clause of section 1 (R. S. 1881, section 249) of the code abolishes the distinctions in pleading and practice between actions at law and suits in equity. The second clause provides that there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a "civil ac-

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tion." "Civil actions," as here used, are not the "civil cases" only of the bill of rights in the Constitution. There, "civil cases" did not include suits in equity. The above section of the code does include them in the term "civil action." They fall within the "one form of action."

Divorce cases, having been of equitable cognizance before the adoption of the Constitution, are not included in the term "civil cases," as used in the bill of rights, but under the above section of the code, they are clearly "civil actions," in such a sense, at least, that the rules of pleading and practice therein provided will apply to them, except to the extent that a different procedure may be provided in the divorce act, and to the extent that it may be apparent that the Legislature intended otherwise.

While a decree of divorce settles the status of the parties, as argued by appellant's counsel, it is also true that the parties have private rights to be enforced and protected, and private wrongs to be redressed, in a divorce proceeding, which may result in separating them for life, in giving the children to one, and not to the other, and in a division of their property. Indeed, to hold that a divorce proceedings is in no sense a "civil action," and that, therefore, no provisions of the civil code are applicable thereto, would be, practically, to overthrow the divorce act. It can not be enforced without reference to the civil code. It provides for a petition, cross-petition, and answer, but makes no provision for a reply or the amendment of pleadings; it makes no provision for a demurrer, a motion for a new trial, for exceptions, or bills of exceptions, or appeal to the Supreme Court; nor is there any provision for a continuance or for a change from the judge. For all these the courts must go, and have always gone, to the civil code.

In the case of *Musselman v. Musselman*, *supra*, section 99 of the code (R. S. 1881, sec. 396), upon the subject of amendments, was referred to as applicable in the divorce proceeding. It might as well be said that in a divorce proceeding

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there can be no demurrer, no motion for a new trial, no exceptions, no bill of exceptions, no continuance, and no appeal to the Supreme Court, because they are not provided for in the divorce act, as to say there can not be a change from the judge, because no such change is provided for in the divorce act. Neither does the divorce act fix the qualification of witnesses, nor provide when and how depositions may be taken. It is provided that witnesses may be examined and depositions taken and used as in *other civil actions*. Section 1041, R. S. 1881. Here is a recognition, in the act, of the fact that the proceeding is, in some sense, at least, a civil action. This same recognition is found in the following section.

After this somewhat extended examination of the question, we are satisfied that section 412, R. S. 1881, is applicable to divorce proceedings, and that either party may have a change from the judge, by filing the proper affidavit.

A holding that in such a proceeding, where so much for the parties personally is involved, and where the welfare of the children and property rights are also involved, either party should be compelled to submit to a trial by an interested, biased or prejudiced judge, would be contrary to all ideas of modern and enlightened jurisprudence.

When we have reached the conclusion that the court below properly changed the venue, we have disposed of all questions as to the authority of the special judge. The right to change the venue is accompanied by the right to appoint a special judge as in any other case. No question is made here as to the regularity of the appointment.

There is another sufficient reason why appellant can not maintain this action, which we can not extend this opinion to elaborate, and that is, that having made no objections of any kind to the granting of the change, the appointment of the special judge, nor to his presiding in the case, it is too late to make such objections in the manner here at-

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tempted. *State, ex rel., v. Murdock*, 86 Ind. 124, and cases there cited.

There is no error in the record. The judgment is affirmed, with costs.

Filed Nov. 23, 1885.

No. 12,202.

WEST ET AL. v. HAYES.

MARRIED WOMAN.—Exclusion of Evidence.—Pleading.—Where to a suit on a promissory note, against a married woman and her husband, she answers her coverture, and that she executed the note as surety for him, it is error to exclude evidence, offered in support of her plea, that she was at the time of executing the note a married woman, and that she signed it as surety for her husband, although the reply alleged that the note was executed in part payment of the purchase-price of land sold and conveyed to her.

SAME.—Signature to Note.—A finding in such case against Warren West is sustained by the introduction of a note signed "W. West."

From the Dearborn Circuit Court.

J. K. Thompson, for appellants.

J. S. Jelley, for appellee.

MITCHELL, J.—This was a suit by Caroline M. Hayes against Warren West and Nancy West, on a promissory note. The defendants jointly pleaded the general issue, and payment. In a separate answer, Nancy West set up that at the date of the execution of the note, she was a married woman, the wife of her co-defendant, and that she executed the note as surety for him.

To the separate answers the plaintiff replied that the consideration of the note was part of the purchase-price of real estate, sold and conveyed by the plaintiff to the defendant Nancy West, of which she had taken, and still remained in possession.

The case being thus at issue, it was submitted to the court for trial. The plaintiff introduced the note in evidence and rested. This was dated at Rising Sun, March 22d, 1883, due eighteen months from date, for \$500, and was signed "W. West, Nancy West."

The defendants then called George M. Roberts as a witness, and propounded to him the following question: "What is the relation between the defendants, and how long has the existing relation continued?" The court sustained an objection to this question. The defendant Nancy, by her counsel, thereupon stated to the court that the witness would testify, in answer to the question, that the defendants Warren and Nancy West were then, and at the date of the execution of the note, husband and wife, and living together as such. The court refused to hear the evidence. The defendants each separately excepted. This was all the evidence given in the case.

The court found for the plaintiff the amount of the note and interest, and, over separate motions for a new trial, judgment was rendered against both defendants.

Nancy West having pleaded that she was *covert* at the time the note was executed, and that she signed it as surety for her husband, it was manifest error to exclude the evidence offered in support of her plea.

In support of the ruling of the court, it is argued that, as the wife had power to execute her note for real estate purchased by her in her own right, and as the note in suit was given upon that consideration, she became principal and her husband surety. The argument, however, assumes the very point in dispute. It proceeds upon the theory that the note was given in part payment for real estate purchased by and conveyed to the wife, without anything appearing in the record to justify the assumption, except that it is so stated in the reply. Having assumed the facts stated in the reply to be true, the insistence of counsel is, that it was competent to exclude evidence pertinent to sustain the answer. The an-

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swer in avoidance of the note having been filed, Nancy West was entitled to maintain it by proof, if she could do so. The first step in that direction was to prove her coverture, and having been deprived of the right to take this step, of course she could take no other. It was not proper to assume that the consideration of the note was the purchase-price of real estate conveyed to her, simply because the plaintiff had replied that fact to her answer.

The only evidence before the court was the note. This did not disclose anything concerning the consideration upon which it was given. There was, therefore, no possible ground upon which to rest the assumption upon which the argument is based. We can not know what proof the appellant might have made, or that she could have made any, but that she had the right, as the issues stood, to prove her coverture, and as much more of her answer as she could, there can be no doubt.

On behalf of the appellant Warren West, it is contended that the evidence does not sustain the finding against him. It is said that the note signed "W. West" does not sustain a finding against Warren West. The point merits no consideration.

The judgment is affirmed as to Warren West, and reversed as to Nancy West.

Filed Nov. 23, 1885.

No. 12,032.

TERWILLIGER v. MURPHY ET AL.

PRINCIPAL AND AGENT.—*One Acting as Agent without Authority is Liable as Principal.*—Where one person assumes to act as the agent of another, but without authority to do so, he makes himself personally liable as a principal in the transaction.

PERSONAL PROPERTY.—*Purchase-Money.*—*Presumption.*—*Delivery.*—In the

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absence of any showing to the contrary, the presumption is that the purchase-money for personal property becomes due and payable when such property is delivered to the purchaser.

JUDGMENT.—*Justice of the Peace.*—*Contract.*—*Separate Judgment Against One Sued Jointly with Others.*—Under sections 568 and 569, R. S. 1881, a judgment may, in an action on a contract before a justice of the peace, be rendered against one only of several defendants sued jointly.

From the Tipton Circuit Court.

W. O. Dean, for appellant.

P. Behymer and *C. W. Swaim*, for appellees.

NIBLACK, C. J.—Harrison Murphy and George H. Cook, claiming to be partners doing business under the firm name of Murphy & Cook, brought this action against Drury B. Vice, Frank Terwilliger and William E. Terwilliger, before a justice of the peace of Tipton county, to recover the value of a quantity of drain tile alleged to have been sold to them. A trial resulted, amongst other things, in a separate judgment against Frank Terwilliger, the appellant here, for \$88.50. Upon an appeal to the circuit court there was a finding and judgment against the appellant for \$88.45, and the only question made in this court is upon the sufficiency of the evidence to support the finding of the circuit court.

Much of the evidence was addressed to merely collateral and incidental matters, and in all that mostly tended to establish a liability on the part of the appellant, it was irreconcilably conflicting.

It is first claimed that there was no evidence tending to prove that the appellees were partners, as averred in the complaint. There was no formal proof establishing the existence of a partnership between the appellees, but the evidence made it quite obvious that if the appellant was liable at all, it was to the appellees jointly, and the cause was tried upon that implied assumption. The fair inference from all the facts and circumstances developed at the trial seemingly was, that the appellees were partners as charged.

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It is next complained that there was no evidence tending to show that the appellant ever bought any tile of the appellees. It was made to appear by the evidence, that William E. Terwilliger, who is the father of the appellant and a resident of the State of Ohio, and Vice, were the owners of adjoining tracts of land in Tipton county through which, or parts of which, a ditch had been opened; that the appellant resided upon and cultivated the tract of land belonging to his father.

There was also evidence tending to prove that the appellant accompanied Vice to the appellees' tile factory and stood silently by while the latter ordered the tile, to recover the value of which this suit was instituted; that Vice, in the appellant's presence, told Murphy, one of the appellees, to charge him, Vice, with one-half of the tile and the Terwilligers with the other half; that the appellant told Murphy that his father would be out from Ohio soon and make it all right.

It is true that the appellant, as a witness, gave a very materially different version as to what occurred at the time the tile was ordered, but there was evidence tending to describe the transaction in question as above stated. After the tile was ordered, the appellant assisted, with his own team, in hauling it to appropriate places for use in connection with the ditch, and in fact hauled a full half of it. It was also established by the evidence, that at the time the tile was ordered and hauled away, the appellant was not the agent of his father, and had no authority to purchase the tile for him, or upon his credit.

In the construction of contracts, it is a well recognized general rule, that where one person assumes to act as agent of another, but without authority to do so, he makes himself personally liable as a principal in the transaction, and this seems to us to have been a case in which that rule was fairly applicable *Newman v. Sylvester*, 42 Ind. 106; *Story Agency*, section 264.

From what has been stated, there was evidence tending to

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establish a state of facts which rendered the appellant separately and personally liable for one-half of the tile ordered by Vice.

It is in the third place claimed that there was no evidence tending to show that the alleged debt was due and unpaid when this action was commenced. In the absence of any evidence to the contrary, the presumption was that the purchase-money for the tile became due and payable when the tile was delivered to and taken away by the parties ordering it and taking it away. Besides, it was impliedly conceded in various ways at the trial, that the purchase-money for the particular tile in dispute was due and remained unpaid, and the only real matter of controversy was as to the person who ought to be held liable to pay for the tile.

The further question is made that as this action was commenced jointly against three persons, it was error to render a separate judgment against the appellant alone. Such judgments are expressly authorized in proper cases by sections 568 and 569, R. S. 1881, and the provisions of those sections have been held to be applicable to proceedings before a justice of the peace. *Fitzgerald v. Genter*, 26 Ind. 238. See, also, *Murray v. Ebright*, 50 Ind. 362; *Stafford v. Nutt*, 51 Ind. 535.

This was very plainly a case in which either a joint or several judgment might have been rendered, as was seemingly right upon the evidence, and, considering the evidence in all its parts and bearings, we see no sufficient reason for a reversal of the judgment upon the evidence.

The judgment is affirmed, with costs.

Filed Nov. 23, 1885.

 Heap v. Parrish.

No. 11,875.

HEAP v. PARRISH.

104	36
138	157
104	36
148	106
104	36
164	578

MALICIOUS PROSECUTION.—*Malice.*—*Probable Cause.*—*Practice.*—In an action for malicious prosecution, the jury may infer malice from the want of probable cause; and where there is evidence from which it could be found that the prosecution was instituted without probable cause, the verdict will not, on the evidence, be disturbed on appeal.

SAME.—*Objection to Evidence.*—*Practice.*—Objections to evidence, on the ground of immateriality or irrelevancy, will present no question for decision, where such fact is not apparent on the face of the evidence.

SAME.—*Motive.*—*Evidence.*—It is competent for the defendant in an action for malicious prosecution to testify that he was not actuated by malice, and as to what his motive was in instituting the prosecution complained of.

From the Sullivan Circuit Court.

S. Coulson, J. S. Bays, S. C. Coulson, J. T. Beasley and A. B. Williams, for appellant.

W. C. Hultz, W. S. Maple and W. A. Massey, for appellee.

Howk, J.—On the 19th day of November, 1883, one Thomas W. Parrish, as sole plaintiff, commenced this action against the appellant, James Heap, as sole defendant, to recover damages for an alleged malicious prosecution of such plaintiff. The cause was put at issue by the appellant's answer in general denial of the plaintiff's complaint. The issues joined were tried by a jury, and a verdict was returned for the plaintiff, assessing his damages in the sum of \$90. Over appellant's motion for a new trial, the court rendered judgment against him on the verdict, in favor of the plaintiff, Thomas W. Parrish. From this judgment the defendant, Heap, appealed to this court; and after his appeal was perfected, but before the submission of the cause, the death of the plaintiff was suggested, and it was shown that, by an order of the court below, all the estate of such decedent had been vested in his widow, Martha J. Parrish. By her agreement and that of appellant, the name of Martha J. Parrish is substituted for that of her deceased husband, as appellee in this cause.

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All the questions discussed by appellant's counsel, in their brief of this cause, arise under the alleged error of the circuit court in overruling his motion for a new trial. Before considering any of these questions, however, we deem it necessary to a proper understanding of the case, that we should first give the substance of the plaintiff's complaint. The plaintiff, Thomas W. Parrish, alleged in his complaint that the appellant maliciously, and without probable cause, instituted a criminal proceeding against such plaintiff, in the court below, charging him with having, on the 28th day of June, 1882, committed a malicious trespass, by then and there injuring and causing to be injured a certain building and structure, then and there situate, built and erected at and over a coal-shaft, and commonly called a coal-shaft building, then and there the property of the appellant, and of the value of \$500; that the clerk of such court issued a warrant upon such charge, by virtue of which the plaintiff herein was arrested and held under bond to appear at such court, and was afterwards tried, acquitted and discharged, and such prosecution against him was ended; that by such prosecution the plaintiff herein was greatly damaged in his good name, and greatly scandalized among his neighbors, and suffered great mortification and agony of mind, and was put to great trouble and expense in and about his defence, and was hindered and prevented from attending to his daily affairs, to his damage \$2,000, for which sum and costs he demanded judgment.

Appellant's counsel first insist that the verdict of the jury was not sustained by sufficient evidence in this, that the evidence fails to show that the appellant maliciously and without probable cause instituted the prosecution against the plaintiff. It is conceded by his counsel, that appellant instituted the prosecution, and that it finally terminated in the acquittal of the plaintiff; but counsel claim that the evidence wholly fails to show the want of probable cause, or that appellant was instigated by malice in commencing the prosecution. We think, however, that there is evidence in the

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record which tends at least to prove that the appellant, without any probable or reasonable cause, instituted the criminal prosecution against the plaintiff, and from which the jury might have fairly inferred and found that appellant was instigated by malice to commence such prosecution. There was evidence before the jury tending to prove that appellant's coal-shaft building was situated within the limits of the incorporated town of Farmersburgh, and extended over and obstructed the free use of one of the public streets of such town; that both appellant and plaintiff had lived in such town for several years, and plaintiff was the street commissioner of such town; that, as such officer, he removed so much of the shed of appellant's coal-shaft building as extended over and obstructed a public street of such town, and that, for this action of the plaintiff, the appellant instituted the criminal prosecution against him for an alleged malicious trespass on appellant's building. From this and other evidence appearing in the record, the jury may have found that the appellant, without any probable or reasonable cause, instituted the criminal prosecution against the plaintiff, "and malice may be inferred by the jury from the want of probable cause." *Bitting v. Ten Eyck*, 82 Ind. 421 (42 Am. R. 505); *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

We can not disturb the verdict of the jury on the evidence.

The next point made by appellant's counsel in argument is, that the trial court erred in the admission of certain deeds, offered in evidence by the plaintiff. The appellant's objections to the admission of these deeds in evidence were, that they were immaterial and irrelevant. The deeds objected to were executed by the appellant, and they conveyed to different grantees certain lots, which were shown by a plat, also in evidence, to abut on the same street which appellant's coal-shaft building extended over and obstructed. We suppose that the deeds were offered and admitted in evidence, for the purpose of showing the appellant's recognition of the existence of both the plat and street, and, for that purpose, the

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deeds were clearly competent evidence. Besides, the immateriality or irrelevancy of the evidence objected to is not apparent on the face of the deeds, and, in such a case, objections to evidence on those grounds will present no question for decision. *Underwood v. Linton*, 54 Ind. 468; *Kinsman v. State*, 77 Ind. 132; *Forbing v. Weber*, 99 Ind. 588.

While the appellant was testifying on the trial as a witness in his own behalf, it is shown by the bill of exceptions that his counsel asked him the following questions:

"1. State to the jury whether or not, in commencing and prosecuting the case of the State of Indiana against the plaintiff, Thomas W. Parrish, in the Sullivan Circuit Court, for malicious trespass in injuring his " (your?) " coal-shaft building, on June 28th, 1882, which constitutes the malicious prosecution complained of in this cause, he " (you?) " was actuated by malice?

"2. You will please state to the jury what induced you to commence and prosecute the criminal action against the plaintiff, complained of in this case, and state also what, if any, motives you had or entertained in reference thereto?"

Perhaps the first of these two questions was objectionable, on the ground that it was leading, for it certainly suggested to the witness the answer he was expected to give. But that was not the ground on which the question was objected to in the trial court, as shown by the bill of exceptions, and, of course, no objection can be urged to the question here which was not assigned in the court below. The record shows that the first question was objected to below on the ground that it was incompetent to prove by the witness what his motives and intentions were; and that the second question was objected to because it was incompetent to prove by the witness what particular inducement operated upon his mind to cause him to commence and prosecute said cause, and because it was incompetent for him to prove his motives. It is shown by the bill of exceptions that when the first question was objected to the appellant's counsel stated to the court that he expected to

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and could prove by the witness, in answer to such question, that he was not actuated by malice, either in the commencement or prosecution of said cause. Also, that when the second question was objected to, appellant's counsel stated to the court that he expected to and could prove by the witness, in answer to such question, that appellant, after consulting his counsel, became satisfied and believed that Thomas W. Parrish was guilty of a criminal trespass, for which he ought to be prosecuted, and that the only motive he entertained or had in view was, that the plaintiff, being guilty of a misdemeanor, ought to be prosecuted and punished therefor, etc. The court sustained the objections to the questions, and excluded the offered evidence.

In these rulings we think the trial court erred; the evidence was competent, and it was error to exclude it from the jury. It is settled law in this State, that where the character of the transaction depends upon the intent of the party, it is competent, when the party is a witness, to inquire of him what his intention was. *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595; *Shockey v. Mills*, 71 Ind. 288 (36 Am. R. 196); *Bidinger v. Bishop*, 76 Ind. 244; *Sedgwick v. Tucker*, 90 Ind. 271; *Padgett v. State*, 103 Ind. 550.

It is claimed by appellee's counsel that the error of the court in the exclusion of such offered evidence was rendered harmless by other evidence, which appellant was permitted to and did give on the trial of this cause. We do not think so. We have carefully considered the other evidence referred to by counsel, and it did not, as we think, supply the evidence which the trial court erroneously excluded. For the error of the court in the exclusion of competent evidence, appellant's motion for a new trial ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial.

Filed Nov. 23, 1885.

Binford, Administrator, v. Adams, Administrator, *et al.*

No. 12,014.

BINFORD, ADMINISTRATOR, v. ADAMS, ADMINISTRATOR,
ET AL.

SUBROGATION.—*Volunteer.*—*Payment of Claim.*—Payment of a claim may be made by a third person; and where a claim is paid by a third person who has no existing interest in the matter, such payment is an extinguishment of the claim, and such person is a mere volunteer, and not entitled to subrogation.

PROMISSORY NOTE.—*Payment.*—*Question of Fact.*—Whether a transaction between the holder of a promissory note and the person who pays the money therefor is of such a character as to constitute a payment that will operate to extinguish the debt, is generally a question of fact.

SAME.—*Transfer of Note.*—*Contract.*—Payment is the discharge of a debt, and is not a contract. The purchase of a note is a contract of sale requiring the mutual assent, either express or implied, of a buyer and seller, and a consideration.

SAME.—*Agreement with Maker.*—Where a third person, at the request of the maker, pays to the holder of a promissory note the amount due thereon, and receives the note, his agreement with the maker can not be considered in determining whether the note was purchased or paid off.

From the Hancock Circuit Court.

J. A. New, J. W. Jones, J. H. Binford and C. W. Miller,
for appellant.

L. H. Reynolds, for appellees.

ELLIOTT, J.—The questions in this case arise on the evidence, and as that is conflicting, we can not weigh it, but, as we have many times decided, we must accept as credible that which the trial court deemed trustworthy. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Gathright v. Burke*, 101 Ind. 590; *Julian v. Western Union Tel. Co.*, 98 Ind. 327; *Cain v. Goda*, 94 Ind. 555; *Arnold v. Wilt*, 86 Ind. 367.

Taking as true, as the rule stated requires us to do, the evidence which controlled the trial court, we find the facts to be substantially these: Francis M. Walker executed a promissory note payable to Thomas A. Gant for \$358, and to secure its payment executed a mortgage upon real estate. Gant sold the note and mortgage to Philander H. Boyd, and endorsed

104	41
198	64
104	41
139	345
104	41
150	476
150	477
150	481
150	497

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the note to him. While the note was in Boyd's hands several instalments of interest were paid, and credits for these instalments were duly entered on the back of the note. In the spring of 1882, Gant requested Walker to pay the note, and Walker obtained the money with which to pay it from Robert Binford, the appellant's intestate. Boyd, the holder of the note testified that the note was paid by Mr. Binford, that Walker was present when the payment was made, and that, to quote his testimony: "Mr. Walker did the talking; he said he had made arrangements with Mr. Binford to pay this note off. 'Mr. Walker,' says I, 'that is all right.' Mr. Binford spoke up and said: 'In a few days I will have the money ready,' and that was all that was said about the note, and in a few days Mr. Binford came in and paid the balance of the note off, and I marked the book paid and went to cancelling the note, and Mr. Binford requested me not to cancel it, and I just handed it to him without cancelling it." This witness also testified that nothing was said about purchasing the note, and that it was not purchased of him. The action is against the administrator of Gant's estate upon the endorsement, and is prosecuted by the administrator of the estate of Robert Binford.

On the part of the appellant, it is affirmed that Binford bought the note. The appellee, on the other hand, asserts that the note was paid.

Binford was a mere volunteer, for he was a stranger to the transaction, without any interest to protect or rights to preserve. The case does not, therefore, come within the rule, that where payment is made by one who has some interest in protecting property against the enforcement of a claim, or who has junior rights to guard, equity will subrogate him to the rights of the person whose claim he has paid; but it is within the general rule, that where a claim is paid by a third person having no existing interest in the matter, it is an extinguishment of the claim. Sheldon Sub., sections 1, 3.

It is well settled that payment may be made by a third

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person. *Ritenour v. Mathews*, 42 Ind. 7; Sheldon Sub., section 186; 2 Edwards Bills and Notes (3d ed.), 536.

Whether a transaction between the holder of a promissory note and the person who pays the money is of such a character as to constitute a payment that will operate to extinguish the debt, is generally a question of fact. *Dougherty v. Deeney*, 45 Iowa, 443; *Moran v. Abbey*, 63 Cal. 56; *Jones v. Bobbitt*, 90 N. C. 391; *Balohradsky v. Carlisle*, 14 Bradwell, 289. It is true that there are cases in which the court may presume, as matter of law, that the debt was not extinguished, but those are cases depending upon the equitable principle of which we have spoken, and this case is not of that class. The general rule prevails here, and the question must be regarded as one of fact.

There is an important difference between the payment of a note and the purchase of it from the owner. Payment is the discharge of a debt. The purchase of a note is a contract of sale. The sale of a note, in order to be valid, must be made by a buyer to a seller; there must be mutual assent, and there must also be a consideration. Daniel says: "Payment is not a contract. It is the discharge of a contract in which the party of the first part has a right to demand payment, and the party of the second part has a right to make payment. A sale is altogether different. It is a contract which does not extinguish a bill or note, but continues it in circulation as a valid security against all parties. And it is necessary to constitute a transaction a sale that both parties should then expressly or impliedly agree, the one to sell, and the other to purchase the paper." 2 Daniel Negotiable Inst., section 1221.

Another author says: "To constitute a sale there must be a clear intention on the one part to buy, and on the other to sell; neither of these standing alone will operate to effect a sale." Edwards Bills and Notes (3d ed.), section 728.

The Supreme Court of California, in a case similar in its general features to the present, said: "The legal effect of the

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transaction was to extinguish the obligation of the note." In the course of the opinion in that case it was also said: "But payment of a promissory note is not a contract; it is performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or any one in his behalf and at his request, or with his consent, may perform the obligation; and when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the *vinculum legis* of right and duty." *Moran v. Abbey, supra*.

The question presented in *Lancey v. Clark*, 64 N. Y. 209 (21 Am. R. 604), was similar to that presented here, and it was there said: "To make a sale or transfer takes two parties, one to sell and the other to buy." The same general doctrine is also maintained in *Eastman v. Plumer*, 32 N. H. 238.

The case of *Burr v. Smith*, 21 Barb. 263, is directly in point, for the facts are so nearly the same, that with a change of names, dates and amounts, one statement of facts would substantially fit both cases. In that case the court said, in speaking of the request that the note should be cancelled, that "It is true he declined having it cancelled; but that circumstance was not enough, in my judgment, to overcome the presumption arising from the facts proved, that it was paid and extinguished. It does not prove a purchase, and unless it was purchased by Riley, it was satisfied by the payment." One of the authors referred to notes the case of the payment of a bill of exchange to save it from dishonor, states that such a case forms an exception to the general rule, and says: "With this exception to the general rule, there is no reason why an officious payment and satisfaction of a bill or note should not be held to cancel the security." 2 Edwards Bills and Notes (3d ed.), section 729.

It is impossible to conceive any valid reason why the sale of a promissory note is not a contract, and once it is granted

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that it is a contract, it must surely follow that there can be no sale unless the holder of the note expressly or impliedly agrees to sell. To assert the contrary is to assert that there may be a contract without a meeting of the minds of the parties, and he who asserts this runs counter to one of the most familiar of the elementary principles of the law. In this instance the owner of the note declares that nothing was said to him about the purchase of the note, and that it never was purchased of him. It can not be possible, therefore, that there was a contract of sale, and if there was not, the note was extinguished.

Stress is laid upon the agreement between the maker of the note and Binford; this agreement, however, is not of controlling force, for the real question is, not what was the agreement between those parties, but what was the agreement between the person claiming as purchaser and the owner of the note, in whom alone was vested the power to sell? The authority to sell was undoubtedly in the holder of the note, and unless he sold the note no one could become a purchaser. *Eastman v. Plumer, supra.* A seller of a note incurs some liability although he transfers the note simply by delivery, for, even in such a case, he warrants the genuineness of the note. *Lancey v. Clark, supra; Delaware Bank v. Jarvis*, 20 N. Y. 226; *Bell v. Cafferty*, 21 Ind. 411; *Brown v. Summers*, 91 Ind. 151. There are authorities extending the implied warranty much further. *French v. Turner*, 15 Ind. 59; 1 Daniel Negotiable Inst., section 729. But we need not pursue this inquiry, for, if there is any warranty at all in the case of a transfer by delivery, it can not be possible that such a warranty can be asserted against a party who has made no contract, and this satisfactorily proves that there can be no purchase of a promissory note unless there is an agreement to sell.

Granting that the case of *Dodge v. Freedman's, etc., Co.*, 93 U. S. 379, correctly lays down the law, it is not in point here, for the reason that here the money was paid directly to the

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holder of the note; while there it was paid to a bank acting as a collecting agent. In that case, the fact that the notes were paid to a collecting agent without authority to bind the holder by a transfer of title, was given prominence, and it may be that this fact sustains the decision. Here, however, the court can not decide that there was a purchase, without deciding, also, that there was an implied warranty binding the person making the transfer; this we can not do, for we can perceive no ground upon which a person can be held to have made a warranty, and yet not have entered into a contract. *Smith v. Sawyer*, 55 Maine, 139, *Willis v. Hobson*, 37 Maine, 403, and *Greening v. Patten*, 51 Wis. 146, support our conclusions.

In *Swope v. Leffingwell*, 72 Mo. 348, as in *Harbeck v. Vanderbilt*, 20 N. Y. 395, there was an assignment of the note to the stranger, by whom the money was paid. Here there was none, and it needs no more than a bare mention of this fact to exhibit the difference between those cases and the present.

Judgment affirmed.

Filed Nov. 24, 1885.

No. 12,201.

STORMS v. STEVENS.

STATUTORY RIGHT.—Mode of Enforcing.—Where a statute creates a new right, and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all others.

DRAINAGE.—Collection of Dutch Assessment.—Tax Duplicate.—Interest after Demand.—When the county surveyor accepts work on a ditch, whether of shares allotted to residents or non-residents of the county, and issues his certificates of acceptance, he must file copies thereof with the county auditor, and the auditor must charge the amount mentioned in the certificates on the tax duplicate, to be collected as taxes are collected; and the holders of such certificates will be entitled to six per cent. interest thereon from demand until paid, or, if no demand has been made and

104 46
124 342
136 282

104 46
130 571

104 46
133 526
133 637

104 46
134 43
136 520
136 556

104 46
139 78

104 46
140 202
141 516
142 232
143 491

104 46
146 625

104 46
148 636
148 647
160 259

104 46
155 209

104 46
157 372

104 46
180 617

104 46
97
1

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the amounts thereof have been placed on the tax duplicate, from delinquency.

SAME—Action at Law.—In such case, the amount of a certificate can not be collected, nor can the lien created by the certificate be enforced, by an action at law.

RULE OF CONSTRUCTION.—Statutes.—In construing statutes, the prime object is to ascertain and carry out the purpose and intent of the Legislature, and, in so doing, the words of a statute will be given their literal and ordinary signification; but if such a construction renders the meaning of a whole statute doubtful, or leads to contradictions or absurd results, the whole statute must be looked to, and the intent, as collected therefrom, will prevail over the literal import of terms and detached clauses and phrases.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellant.

J. B. Kenner, J. I. Dille, W. G. Sayre and J. T. Hutchens, for appellee.

ZOLLARS, J.—A ditch was constructed by order of the board of county commissioners, under R. S. 1881, section 4285, *et seq.* The auditor sold the shares or allotments of work as provided by section 4303. Appellant bought the share allotted to appellee, and received from the county surveyor the certificate as provided by section 4305. He brought this action in the court below to enforce against appellee's land the lien created by sections 4317 and 4305. He contends that this kind of an action may be maintained. Appellee contends that it can not; that the statutory mode of collection is, by placing the amount upon the tax duplicate, to be collected as other taxes are collected, and that this mode is exclusive of all others. If the statute does provide a mode of collection, that is exclusive, and must be pursued. The statute clearly creates a new right. Where a statute creates a new right and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all other remedies. Such has been the settled law in this State for more than sixty years, and such is the law elsewhere. *Lang v. Scott*, 1

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Blackf. 405; *Butler v. State*, 6 Ind. 165; *Martin v. West*, 7 Ind. 657; *McCormack v. Terre Haute, etc., R. R. Co.*, 9 Ind. 283; *Toney v. Johnson*, 26 Ind. 382; 1 Wait's Actions and Defences, p. 42.

The enunciation of this rule of law does not dispose of the case before us. The question yet remains as to whether or not the statute prescribes a mode of collecting the amount of the certificate held by appellant. The solution of that question depends upon the proper construction to be placed upon section 4305 of the act. That section is as follows:

"It shall be the duty of the county surveyor, on being notified by any contractor that his job is completed, to inspect the same; and if he find that it is completed according to contract, he shall accept it, and give to the contractor a certificate of acceptance, stating that said job, share, or allotment is completed according to the specifications of said ditch. And if any share or allotment has been sold to a person not the owner of the land assessed therefor, he shall, in addition, state the amount due the contractor for constructing the same from the owner of the said land; which certificate shall be a lien upon the land assessed for such share or allotment, and shall be due and payable immediately by the owner of the land; and such certificate, if not paid on demand, shall draw interest until paid. And if the allotment sold belongs to a non-resident of the county, the auditor shall state such fact when he offers it for sale. And when the county surveyor accepts it, and issues his certificate of acceptance, he shall file with the county auditor a copy thereof; whereupon said auditor shall charge the amount mentioned in said certificate on the tax duplicate against the land assessed with such allotment, to be collected as other taxes are collected, together with six per cent. for the holder of the certificate after the same becomes delinquent; and when collected, it shall be paid to the person holding the certificate, on an order of the auditor."

The contention of appellant's counsel is, that the above sec-

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tion provides no mode of collecting the amount of the certificate given for the work of the shares allotted to residents of the county, and that hence the lien may be enforced in the manner here attempted. This contention is based upon the language of the section, preceding the mention of the allotment to non-residents of the county, and, particularly, upon that portion which provides that the certificate shall be due and payable immediately, and shall draw interest after demand. It is also argued, that the subsequent portion of the section has reference only to the collection of certificates given for the work of shares allotted to non-residents of the county. Their position, therefore, is, that the certificates given for the work of shares allotted to residents of the county, must be collected by suit, and that the certificate given for the work allotted to non-residents of the county must be collected as taxes are collected. The awkward manner in which the pronoun "it" is used in the latter part of the section of the statute, is calculated, at first blush, to confuse, but the manner of its use is not such as to warrant the conclusion that only copies of certificates given for the work of shares allotted to non-residents of the county, are to be filed with the county auditor by the county surveyor. The section must be considered as a whole, in order to ascertain the intention of the Legislature in its enactment.

It is made the duty of the county surveyor to inspect the work, and if he finds it properly completed, to accept it. He does not accept the allotment. With that he has nothing to do; and hence the provision in the latter part of the section, "and when the county surveyor accepts it, and issues his certificate of acceptance, he shall file with the county auditor a copy thereof," does not refer to the allotment to non-residents of the county, but has reference to the acceptance of the work as provided in the first part of the section, including the work of shares allotted to residents and to non-residents of the county alike.

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When the county surveyor accepts work, whether that work be of shares allotted to residents or to non-residents of the county, and issues his certificates of acceptance, he must file copies thereof with the county auditor, and the auditor must charge the amount mentioned in the certificates on the tax duplicate, to be collected as taxes are collected.

The phrase "due and payable immediately," in the connection in which it is used in the statute, is not the same as "due and legally enforceable immediately," as argued by counsel. In the first place, such would not be the usual and ordinary meaning of the words "due and payable." In the second place, such a construction would not make sense. The whole phrase is "due and payable immediately by the owner of the land." It would hardly do to make the statute read, "due and legally enforceable immediately by the owner of the land." The burden is upon the land. The owner of the land is, in a sense, the debtor of the holder of the certificate. Appellant's construction would make the section of the statute so read as to confer upon the debtor, and not upon the creditor, the right to enforce the lien and debt by suit. This would clearly be a *reductio ad absurdum*, which is to be avoided both in logic and in the construction of statutes and Constitutions.

In the construction of statutes, the prime object is to ascertain and carry out the purpose and intent of the Legislature. To do this, the words used in the statute should be first considered in their literal and ordinary signification. But if by giving them such a signification the meaning of the whole statute is rendered doubtful, or is made to lead to contradictions or absurd results, the whole statute must be looked to, and the intent as collected therefrom must prevail over the literal import of terms and detached clauses and phrases. *Mayor, etc., v. Weems*, 5 Ind. 547; *Smith v. Moore*, 90 Ind. 294, 305, and cases there cited.

As will be observed, it is provided in the above section of the statute, that the certificates issued by the county surveyor

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shall draw interest after demand until paid; and, further, that when the amount thereof shall have been placed upon the tax duplicate, it shall be collected as taxes are collected, together with six per cent. after the same shall have become delinquent. Appellant's counsel base an argument upon these apparently different provisions as to interest, and contend that they indicate an intention on the part of the Legislature that only the amounts of the certificates issued for work allotted to non-residents of the county are to be placed upon the tax duplicate.

While the canons of construction require that every word, phrase and clause of a statute shall be given effect, if possible, they also require that the entire statute, and every part thereof, must be construed together, so as to make a harmonious whole. Properly interpreted, in connection with the whole section in which they are found, the above provisions in relation to interest must mean, and can only mean, that after demand the certificates, whether issued for work allotted to residents or to non-residents of the county, shall draw interest. If for any reason no demand shall have been made, they do not draw interest until after the amounts thereof shall have been placed upon the tax duplicate, and shall have become delinquent. The interest, which begins with the demand, is carried up to the time of the delinquency, and thereafter is merged in the interest resulting from such delinquency.

The section further provides, as will be observed, that if the allotment belongs to a non-resident of the county, the auditor shall state such fact when he offers it for sale. This provision could not have been incorporated in consideration of the fact that an action to enforce the lien could not be maintained against a non-resident of the county as well as against a resident, because such would not be the case. The certificates are liens upon the land, and if enforceable by action at all, they could be enforced by an action in the county where the land is situated, by getting service upon the owner in the county of his residence.

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The policy of the law is to have the shares or allotments worked for the lowest possible amount. It was evidently thought by the Legislature, that many of the land-owners would pay upon demand, and thus enable the contractor to receive his money without the vexatious delay attendant upon a collection through the county auditor. A demand upon a resident of the county can be made in less time, and with less trouble and expense, than upon a non-resident of the county. It may be, too, that a resident of the county would be more likely to pay promptly upon such a demand. These considerations might well influence the bidders for the work, and induce them to bid less for work allotted to a resident of the county than to a non-resident. It is for these reasons, we think, that the auditor is required to state that the share of work offered for sale is an allotment to a non-resident of the county, when such is the fact.

Other arguments are urged in behalf of appellant, but we think it would not be profitable to extend this opinion to notice them in detail. Looking to the whole statute, we are convinced that the Legislature did not intend to, and have not provided two different and distinct modes of collecting the amounts of the certificates, and that the one mode provided is by the auditor placing the amounts upon the tax duplicate, and collecting them as taxes are collected. The right is one created by the statute. The statute provides a remedy, and that remedy is exclusive of all others. Appellant can not, therefore, maintain this action, and hence the court below properly sustained the demurrer to the complaint.

The judgment is affirmed, with costs.

Filed Nov. 23, 1885.

Bufkin v. Boyce.

No. 12,175.

BUFKIN v. BOYCE.

RECEIVER.—Pleading.—Practice.—Ordinarily, the sufficiency of a complaint, in an action in which a receiver is applied for, can not be tested by demurrer, or otherwise, at the time of the application.

SAME.—Appointment.—Purpose of Action.—The appointment of a receiver may be part of the relief asked in a complaint in actions of the class in which receivers may be appointed, but it is doubtful whether this can be the sole purpose of an action.

SAME.—Partnership.—When Receiver will not be Appointed.—Where a partnership has expired by limitation, and neither party desires to continue the business, a receiver will not, on the application of one, be appointed to settle the partnership affairs, in the absence of any showing of mismanagement or improper conduct on the part of the person against whom the relief is sought.

From the Judge of the Delaware Circuit Court.

J. H. Mellett, E. H. Bundy and L. P. Mitchell, for appellant.

MITCHELL, J.—This is an appeal from an interlocutory order, made by the judge of the Delaware Circuit Court, sitting at chambers, in Winchester, Randolph county.

It appears that James Boyce filed a complaint in the clerk's office, in Delaware county, on the 10th day of February, 1885. The substance of the complaint was, that Boyce and Bufkin had become partners under written articles, dated February 1st, 1882. The partnership expired by limitation February 1st, 1885. At its expiration there was on hand partnership property, consisting of agricultural implements and other property, including notes and accounts due the firm, of the value of from \$3,500 to \$4,500. The firm owed debts amounting to about \$3,000. It is averred that neither partner desires to continue the business, and that they were unable to agree as to the disposition of the property; that the defendant was in possession of the property, and refused to reduce it to money and discharge the debts of the firm. The complaint avers further that the defendant is insolvent, and that he insisted upon collecting the notes and accounts

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due the firm, and disposing of the proceeds for his own personal advantage and gain; that the stock was likely to depreciate in value, and that the partners were unable to agree upon terms of dissolution, or upon the construction of their articles of copartnership. The relief prayed was for a dissolution, that an account be taken, and an injunction granted forbidding the defendant from interfering with the business, and for the appointment of a receiver.

The record does not show whether a summons was issued before the order appealed from was made, but as no question is made at this point we give it no further consideration.

The complaint was verified, and as no motion or other application for the appointment of a receiver appears in the record, it was doubtless intended to serve the purpose of both complaint and application. As, from the averments in the complaint, the partnership had come to an end by limitation, and as there was no claim of any dispute or controversy between the partners concerning the property or accounts, the only substantial relief asked was an injunction and the appointment of a receiver. No affidavits or other evidence having been offered, the appointment was asked upon the facts stated in the complaint.

Three days after the complaint was filed in the clerk's office in Delaware county, the parties appeared before the judge at chambers, in Randolph county, and the defendant presented what is denominated in the record an answer to the plaintiff's complaint. In the answer, the defendant denies that he at any time claimed or held the exclusive possession of the partnership property, except as provided for in the articles of partnership. These are exhibited with the answer. The answer also avers that in pursuance of a stipulation contained in the articles of partnership, the defendant, at the expiration of the term, caused a complete inventory and appraisement to be made of all the firm property, notes, etc. This is also exhibited with the answer. From this it appears that

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the assets were appraised by three appraisers at a total cash value of \$4,750.29.

The answer further avers that the plaintiff is solvent, and a large creditor of the firm, and that for the purpose of saving expense the defendant then offered to turn over to the plaintiff all the property and assets of the firm, to the end that the plaintiff might settle its business equitably and expeditiously, agreeable to the terms of the articles of partnership and the direction of the court. This answer was verified by the defendant.

To this the plaintiff presented what is termed a reply, which was also verified. In this it was stated that the plaintiff could not accept the defendant's offer to deliver over the possession of the assets, because they were unable to agree upon the construction of the articles of partnership, and that their disagreement was liable to involve the business in litigation. It was stated further that the defendant had always managed the business, and that the plaintiff had no experience in its affairs, and, besides, he had other business which required all his time. For these reasons the reply averred that the best interest of the business demanded that a receiver be appointed.

Upon this showing an order was made appointing a receiver, and directing that upon filing a bond he should take possession, and dispose of the stock under the direction of the court.

It is assigned for error that the complaint did not state facts sufficient to authorize the appointment of a receiver, and that the court erred in making the appointment upon the facts shown by the whole record.

Ordinarily, the sufficiency of a complaint, in an action in which a receiver is applied for, can not be tested by demurrer, or otherwise, at the time of the application or motion for the appointment of a receiver. Pleadings and demurrers are not relevant to such an application. *Pressley v. Harrison*, 102 Ind. 14; *Pouder v. Tate*, 96 Ind. 330; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510.

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In the case before us, the complaint was regarded as an application for a receiver. The appointment of a receiver seemed to be the ultimate relief demanded. Whether a complaint may in any case be maintained when no other facts are stated upon which relief is asked, we need not decide in this case. Without doubt, the appointment of a receiver may be part of the relief asked in a complaint, in actions of the class in which receivers may be appointed. *Newell v. Schnull*, 73 Ind. 241. It may, however, admit of much question whether this can be the sole purpose of an action.

In the case of *Hottenstein v. Conrad*, 9 Kan. 435, it was said: "The appointment of a receiver is a provisional remedy. It is an auxiliary proceeding. It is not the ultimate end or object of a suit."

In *Chicago, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83, AGNEW, J., said: "The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion." *Pressley v. Harrison*, *supra*; High Receivers, section 6.

Without deciding anything in respect to the complaint as a bill invoking the aid of a court in obtaining equitable relief, but considering it merely as an application for the appointment of a receiver in an action pending, and regarding the facts shown by it, with those set forth in the answer and reply, as grounds stated for and against the appointment of a receiver, we think no case is made justifying such appointment.

It appears that the partnership had expired by limitation; that nothing remained except to wind up its affairs according to the terms of the agreement under which it had its inception. It is true it is stated that the defendant was in possession of the partnership property, but there was no statement that he denied the plaintiff's right to equal possession and control, or that his possession was wrongful or in hostility to the plaintiff. The defendant was not bound to abandon the property simply because of his alleged insolvency. For all that appears, there may have been abundant reason for the de-

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defendant's refusal to reduce the stock to money. The statement that he insists upon using the property for his own advantage, is not the averment of any fact of which cognizance can be taken. There are no facts stated in the complaint which put the defendant in any wrong, or which show that he was conducting himself inconsistent with the plaintiff's rights. That the parties disagreed about the construction of the partnership agreement, without averring what the agreement was, or wherein the defendant was acting in violation of it, counts for nothing. It may have been that the defendant was right. At all events, it can not be presumed, without more, that he was wrong.

If the complaint, treated as an application for the appointment of a receiver, had shown sufficient ground for such appointment, we think it was fully overcome by the answer. In this the defendant denied that he had or claimed the exclusive possession of the property. With it he exhibited the partnership agreement, under which he was charged with the control and management of the business, and which required him, at the expiration of the partnership, to make an inventory and appraisal of the property. This he proceeded to do, and in the presence of the judge offered to turn over the property to the exclusive possession of plaintiff, to be disposed of according to the agreement.

That the plaintiff had neither the time nor experience to take charge of the property, was no reason for taking it out of the possession of the defendant, even though the parties were not agreed as to the construction of the articles of partnership. What the point or matter in controversy was does not appear. From the whole record, the case seems to be this: The partnership having come to an end, the plaintiff was unwilling to take the responsibility of settling the business of the firm himself. Without showing any sufficient cause for it, he distrusted the defendant. He desired, therefore, to impose the burden of administering its affairs on the court.

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It is no part of the duty of courts to interfere in, and take the management of, the business of partners at the request of one partner who has the undisputed possession and opportunity to manage it himself. High Receivers, sections 490, 491.

Where a dissolution has taken place, a court of chancery will not take upon itself the administration of the partnership assets, unless there is some mismanagement or improper conduct on the part of the person against whom the relief is sought. Kerr Receivers, 82.

Where the object of the suit is to effect a dissolution of an existing partnership, on account of a breach of duty, and to secure an accounting and distribution of the assets, a receiver will be appointed in order to preserve the property pending the litigation, upon showing sufficient cause for it. Edwards Receivers, 310.

We have, however, no such case here. The showing here is, that the partnership has expired; that neither wishes to continue the business, and that nothing remains to be done except to wind up its affairs. No facts are stated which call for the intervention of the court. The defendant denied all suggestion of wrong, asserted that he was proceeding in conformity with the articles of partnership, and offered to turn over the assets to the plaintiff. To the offer of defendant to surrender the entire stock and assets to the plaintiff for disposition and settlement, the plaintiff's only reply was, that he had not the time and experience to attend to it, and that the parties were in disagreement as to the construction of their partnership contract.

No ground for the appointment of a receiver is shown. *Shoemaker v. Smith*, 74 Ind. 71; *Morey v. Grant*, 48 Mich. 326; *Baker v. Backus*, 32 Ill. 79; *Willis v. Corlies*, 2 Edw. Ch. 281; *Jones v. Schall*, 45 Mich. 379; *Cook v. Detroit, etc., R. R. Co.*, 45 Mich. 453.

The interlocutory order appointing a receiver is reversed, with costs.

Filed Nov. 23, 1885.

Ryon, Receiver, v. Thomas *et al.*

No. 12,048.

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RYON, RECEIVER, v. THOMAS ET AL.

JUDGMENT.—Clerical Mistake.—Amendment.—Courts having jurisdiction to render a judgment have inherent power to amend clerical mistakes in a direct proceeding for that purpose, where the rights of third persons have not intervened.

SAME.—Equity.—Interlocutory Order.—Proceeding for Amendment.—An interlocutory order entered in a matter of purely equitable jurisdiction is within the control of the court making it until the proceeding in which it is made is finally disposed of, and it may be amended, modified or set aside, as the right of the case requires, either upon direct and summary proceedings for that purpose, or by the court upon its own motion.

SAME.—Practice.—In such cases the court should hear the application for relief upon its merits, in a summary way, with leave to any party interested to reserve an exception upon any ruling, as in other interlocutory proceedings.

RECEIVER.—Interlocutory Order.—Mistake.—Amendment.—Where a receiver, previous to a final settlement, is by a mistake ordered to pay out more money than had or would come into his hands as such receiver, he is entitled to have the order modified.

From the Hancock Circuit Court.

J. A. New and *J. W. Jones*, for appellant.

E. Marsh, *W. W. Cook* and *M. B. Gooding*, for appellees.

NIBLACK, C. J.—While the firm of Cook & Allen was engaged in the prosecution of its partnership business, Allen borrowed of Thomas, one of the appellees, about \$300 for his individual use, and executed to him a chattel mortgage upon all the property of the firm to secure the payment of the money thus borrowed. Ryon, the appellant, was afterwards, by the Hancock Circuit Court, appointed receiver of this firm of Cook & Allen, and entered upon the duties imposed by his appointment. By his second report of the condition of the assets of the firm; known as report No. 2, it was shown that he had in his hands a balance of \$122.03 in cash, and of \$125.48 in uncollected notes.

Thomas had in the meantime filed his claim for money borrowed by Allen, against Ryon, as such receiver, asking

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its allowance as a demand against the firm. Ryon resisted the payment of this claim out of the assets of the firm, but after report No. 2 was made, as above stated, and before a trial upon the claim was reached, the parties came to an agreement concerning it, and a record entry intended to carry such agreement into effect was made by the circuit court, substantially as follows: "John S. Thomas v. John W. Ryon, receiver: Comes now John S. Thomas, plaintiff, by D. S. & M. B. Gooding, his attorneys, and comes also John W. Ryon, receiver herein, by New & Jones, his attorneys, and this cause is compromised as per written agreement on file. The court thereupon finds that heretofore, on the 25th day of November, 1881, Ambrose D. Allen, of the firm of Cook & Allen, executed his certain chattel mortgage upon all the property of said firm to John S. Thomas to secure the payment of \$300 indebtedness due to him from said Allen. The court further finds that thereafter John W. Ryon was appointed receiver of the assets of the firm of Cook & Allen, as averred in the plaintiff's complaint; that, as such receiver, he took charge of all the partnership property of said firm; that said receiver now has in his hands, after payment of the indebtedness of said partnership of Cook & Allen, the sum of \$247.51. The court (also) finds that by reason of the chattel mortgage, the said Thomas has a lien upon the said one-half of said sum of \$247.51, subject to the expenses of settling said receivership. It is, therefore, considered and adjudged that said Ryon, receiver, pay out of the funds now in his hands the sum of \$100 to Charles W. Cook, one of the members of said firm of Cook & Allen, and that as to \$100 of said funds now in his, Ryon's, hands, the aforesaid lien of said Thomas be foreclosed, and that said sum of \$100 be paid to said Thomas, and that hereafter, as said Ryon may proceed in his settlement of matters of said partnership as receiver as aforesaid, and after the payment of all the expenses of said receivership and the indebtedness of said firm, one-half of the balance remaining in his hands shall be paid

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over to the said Charles W. Cook, and the other half to the said John S. Thomas on his mortgage lien, which is hereby declared to be foreclosed. It is further considered and adjudged that the defendant in this action recover of plaintiff all the costs of said action, * * * all of which is adjudged and decreed by the court."

This record entry was made in October, 1883, and on the 10th day of September, 1884, Ryon filed his complaint in the court below, in the nature of a petition in equity, charging that at the time the foregoing order and decree was entered he had in his hands only the sum of \$122.03 in cash, as shown by Report No. 2, and that in that report he had by mistake overcharged himself as with cash in hand in the sum of \$2.81; that out of the notes referred to in said report he had only collected the additional sum of \$34.86, the remainder of said notes being worthless; that, consequently, the finding of the circuit court that he had on hand, at the time the record entry set out as above was made, the sum of \$247.51, was an erroneous finding; that such erroneous finding resulted from a mutual mistake and inadvertence of the parties to the proceeding; that after paying the indebtedness against the firm, and the expenses of the receivership, there would not remain in his hands a sum sufficient to pay Cook and Thomas \$100 each. He therefore prayed that the order and decree, entered as above, should be reviewed, reformed and modified, so as not to require him to pay out a sum of money greater than he might have in his hands as receiver of the firm herein above named, when final settlement should be made.

The complaint was verified by affidavit, and contained two paragraphs.

An appearance on behalf of both Thomas and Cook was entered to the complaint. Thomas demurred separately to the complaint, and, his demurrer being sustained, final judgment was rendered in favor of both Thomas and Cook upon demurrer.

All mistakes in a final judgment of a merely clerical char-

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acter may be amended in a direct proceeding for that purpose, where the rights of some third party have not intervened in such manner as to render an amendment inequitable. *Jenkins v. Long*, 23 Ind. 460; *Makepeace v. Lukens*, 27 Ind. 435; *Goodwine v. Hedrick*, 29 Ind. 383; *Hebel v. Scott*, 36 Ind. 226; *Bales v. Brown*, 57 Ind. 282; *Miller v. Royce*, 60 Ind. 189; *Bristor v. Galvin*, 62 Ind. 352; *Newhouse v. Martin*, 68 Ind. 224; *Urbanski v. Manns*, 87 Ind. 585; *Gray v. Robinson*, 90 Ind. 527; *Runnels v. Kaylor*, 95 Ind. 503; *Daniels v. McGinnis*, 97 Ind. 549; Freeman Judg., section 72.

The power to authorize such amendments to be made is originally traceable to certain English statutes recognized as in force in this State (see *Makepeace v. Lukens*, *supra*), but it is now generally accepted and treated as a power inherent in every court having jurisdiction to render a judgment.

There is another and distinct class of cases in which, by section 396, R. S. 1881, the courts are required to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years. *Buck v. Havens*, 40 Ind. 221; *Lake v. Jones*, 49 Ind. 297; *Ellis v. Keller*, 82 Ind. 524; *Sidener v. Coons*, 83 Ind. 183; *Chissom v. Barbour*, 100 Ind. 1.

The distinction between these two classes of cases has not always been closely observed, and, in consequence, the value of some of the decided cases as precedents is to a partial extent at least impaired.

In our opinion, however, the proceedings and record entry before us do not fall within either one of the classes above mentioned. While the record entry in question contains a finding of certain facts and has some of the characteristics of a final decree in chancery, it is, nevertheless, essentially nothing more than an interlocutory order entered in a matter *in fieri*, of purely equitable jurisdiction. Such interlocutory orders, when within the jurisdiction of the court, are, as to

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all matters properly embraced within them, of binding authority so long as they remain in force, but they are within the control of the court making them until the proceeding or cause in which they are made is finally disposed of.

Such orders, when ascertained to be erroneous or an impediment to further rightful proceedings, may and ought to be amended, modified or set aside, as the right of the case requires, either upon direct and summary proceedings instituted for that purpose, or by the court upon its own motion.

Proceedings in the settlement of receiverships have a general analogy to those involved in the settlement of estates, either in the hands of an executor or administrator, or of a trustee under a voluntary assignment, and hence some questions discussed in the case of *Parsons v. Milford*, 67 Ind. 489, have a bearing upon, as well as a practical application to, the general principles herein announced. In summary proceedings of the general character of the case now under consideration, formal issues upon pleadings, whether of law or of fact, are not contemplated, but such issues may doubtless continue to be tolerated in certain cases, as they have been heretofore in some instances, when formed by consent of parties, either express or implied, and with the approbation of the court, if thereby no injury is inflicted upon the merits of the question intended to be presented. *Board, etc.*, v. *Ritter*, 90 Ind. 362; *Board, etc.*, v. *Emmerson*, 95 Ind. 579.

No decision, however, of any question upon the sufficiency of a pleading filed in such a summary proceeding ought to be accepted as a final disposition of the application for relief, unless by the decision the application is, in effect, fairly disposed of upon its merits. In other words, the correct practice in a case like this is for the court to hear the application for relief upon its merits, in a summary way, with leave to any party interested to reserve an exception upon any ruling which he may regard as injurious to his interests, as in other cases of merely interlocutory proceedings.

By the facts averred in the complaint in this case, it was

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shown that Ryon was ordered to pay out more money than had or would come into his hands as the receiver of the firm of Cook & Allen. It is fair to assume that it was not the intention either of the parties, or of the court, that such an order should be entered. By the same facts, it was further shown that the order in question was prematurely entered, since it assumed to definitely dispose of the money in Ryon's hands in advance of a final settlement of the receivership. Ryon ought not to be held by any order, and certainly not when entered by some mistake or inadvertence, to pay out to either Thomas or Cook more money than may remain in his hands upon such final settlement. Therefore, upon the facts charged by Ryon, he was at least entitled to have important modifications made in the interlocutory order complained of. As to petitions in chancery, see 2 Barbour Chan. Prac. 578; 1 VanSantvoord Eq. Prac. 422; 1 Smith Chan. Prac. 70.

The judgment in favor of the appellees upon demurrer is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed Nov. 24, 1885.

No. 11,703.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY
COMPANY v. CONN.

RAILROAD.—Negligence.—Action for Injury.—Proximate Cause.—In an action against a railroad company to recover damages for injuries caused by its alleged negligence, the complaint must not only charge the defendant with the negligent acts, whether of commission or omission, but also show with reasonable certainty that such acts were the direct or proximate cause of the accident or injury.

SAME.—Allegation of Negligence.—In such case, the allegation in the complaint, that the defendant, with gross negligence and in a careless and

104	64
146	376

104	64
159	71

104	64
166	266

104	64
170	547

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reckless manner, caused one of its locomotives, then and there operated by its servants and agents, to rapidly approach the street crossing where the accident occurred, without having the headlight lit in said locomotive, and without giving any reasonable, timely or proper warning, notice or signal of its approach, either by ringing the bell or blowing the whistle at a safe and reasonable distance from said crossing, fails to show that the accident or injury was caused by the negligence of the defendant.

SAME.—Contributory Negligence.—Presumption.—Where, from the specific facts alleged in a complaint, it might well be presumed that the plaintiff was guilty of contributory negligence, yet such presumption is one of fact, and will not be allowed to overcome or outweigh the positive averment of plaintiff to the contrary.

From the Cass Circuit Court.

N. O. Ross and G. E. Ross, for appellant.

D. D. Dykeman, W. T. Wilson, G. C. Taber and W. A. Kearney, for appellee.

Howk, J.—The first error of which complaint is here made on behalf of appellant, the defendant below, is the overruling of its demurrer to the first paragraph of appellee's complaint.

In this first paragraph, the appellee alleged that the appellant was a railroad corporation, doing business in this State under and by virtue of the laws thereof, and owned, controlled and operated its railroad from Logansport, Indiana, to Chicago, Illinois, in and through the town of Royal Center, in Cass county, and its railroad was laid and constructed over and across North street, in such town of Royal Center; that in such town appellant owned a switch or side-track, which was laid and constructed parallel to its main track, about forty feet distant therefrom, over and across said North street in such town; that appellant owned locomotive engines and cars, and used and operated them on and along its main track, and on and along its switch or side-track, over and across North street, in such town; that on the 1st day of October, 1882, at about 8 o'clock in the evening, the ap-

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appellee was travelling west on said North street towards his home, driving his horse hitched to his carriage in which he was seated, but upon reaching such railroad he was prevented from crossing the same by a locomotive and train of cars, then and there operated and managed by appellant's servants and agents, which the appellant carelessly and negligently caused and permitted to remain standing on its main track across said North street, thereby completely obstructing all travel and passage along such street for a long time, to wit, one hour, contrary to law and the statutes prohibiting the standing of locomotives and trains over the crossing of a public highway for a longer time than fifteen minutes.

And the appellee averred that while he was waiting for such obstruction to be removed, he had driven his horse and carriage over and across such switch or side-track, into the space on North street between the main track and such switch or side-track, and seated in his carriage he had so waited for, to wit, one-half hour, when one of appellant's agents and servants warned him that a train was coming and to get out of the way; that he heeded such warning and immediately turned his horse and started to drive back across such switch or side-track eastwardly on said North street, but before he could get across the appellant, with gross negligence and in a careless and reckless manner, caused one of its locomotives, then and there operated by its servants and agents, to rapidly approach said North street on and along such switch or side-track, without having the headlight lit in such locomotive, and without giving any reasonable, timely or proper warning, notice or signal of its approach, either by ringing its bell or blowing its whistle at a safe and reasonable distance from the crossing of the switch or side-track at North street, and the appellant then and there, without any fault or negligence on the part of appellee, caused such locomotive to hit and strike his horse and carriage, thereby killing the horse and utterly demolishing the carriage, and throwing appellee out of such carriage violently upon the ground, thereby bruising and

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wounding him, and causing him great bodily pain and suffering, whereby he was put to great expense for medical treatment and was prevented from attending to his business for a long time, to wit, one month.

And the appellee further said that, at the time such injury was received, the night was dark and foggy, making it impossible to discern objects a short distance away, and that appellant's locomotive bore down upon appellee so rapidly, without light or warning, that it was impossible for him to get out of the way or prevent the accident and injury; that such accident occurred, and such injury was received, without any fault or negligence on his part whatever, and that by the killing of his horse, the destruction of his carriage, and the injury to himself, and the expenses incurred for medical treatment in procuring his recovery, the appellee was damaged in the sum of \$1,000. Wherefore, etc.

Two objections are urged by appellant's learned counsel to the sufficiency of this first paragraph of complaint, namely:

1. That it does not charge or show, by its averments of facts, that the injuries received by appellee, and of which he complains, were caused directly or remotely by the negligence of the appellant, alleged in such first paragraph; and,

2. That although appellee alleged in such first paragraph, in general terms, that the accident occurred, and the injury was received, without any fault or negligence whatever on his part, yet the specific facts stated in the paragraph, in regard to what he did at the time, were sufficient to overcome such general allegation, and to show that, in fact, he was guilty of negligence which contributed directly to the accident and injury.

We will consider these objections to the sufficiency of the first paragraph of complaint, in their enumerated order.

1. The negligence imputed to the appellant, in the first paragraph of appellee's complaint, is alleged as follows: "The defendant, with gross negligence and in a careless and reckless manner, caused one of its locomotives, then and there

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operated by its servants and agents, to rapidly approach said North street, in and along said switch or side-track, without having the headlight lit in said locomotive, and without giving any reasonable, timely or proper warning, notice, or signal of its approach, either by ringing the bell or blowing the whistle at a safe and reasonable distance from said crossing of said switch or side-track, at said North street." It is clear we think, that in this allegation the appellant is charged with negligence, only in its rapid approach toward North street in the manner stated. It is not alleged that the appellant, with or without negligence, caused one of its locomotives to rapidly enter upon or cross over North street at the crossing of the switch or side-track, or, indeed, that the locomotive did, in any manner, enter upon or cross over North street at such crossing. It might be true, as alleged, that the appellant negligently caused the locomotive to rapidly approach North street at the crossing, in the manner stated, and yet be equally true that appellant, with due care and proper precaution, caused the locomotive to slowly enter upon and cross over North street at such crossing. The accident and injury complained of occurred in North street, at the crossing thereof by the switch or side-track, and there is nothing in the first paragraph of complaint to show that appellant was then and there negligently operating or running its locomotive, or that it was not, then and there, exercising due care and caution in the operation or running of its locomotive. In other words, the appellee has failed to state or show that his accident and injury, of which he complains, were caused or occasioned by the negligence of appellant, alleged in the first paragraph of his complaint.

It is not enough, in such a case as this, to charge the defendant with negligent acts, whether of commission or omission; but it must also be shown, with reasonable certainty, that such acts were the direct or proximate cause of the accident or injury, or the complaint must be held bad on demurrer for the want of sufficient facts. This rule is usually

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applied to cases where the complaint shows, upon its face, that the accident or injury was caused by an intervening agency ; but it is equally applicable, we think, to cases where the complaint fails to show, by proper averment, that the accident or injury was caused by the alleged negligent acts of the defendant. "One thing, however, in this connection, ought always to be borne in mind, and that is, in all actions for negligent injuries, it is not enough to show that the defendant has been guilty of negligence. It must also be made to appear that the imputed negligence was a proximate cause of the injury sued for." *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (36 Am. R. 188). "There must be some connection between the negligence and the injury in the way of cause and effect; and the negligence which creates liability must be the proximate cause of the injury." *City of Greencastle v. Martin*, 74 Ind. 449, on p. 457 (39 Am. R. 93). In *Pennsylvania Co. v. Galentine*, 77 Ind. 322, a paragraph of complaint was held bad on demurrer, because it failed to show "that the injury was caused by, or resulted from, the negligence of the defendant" charged therein.

For the reasons given we are of opinion that the first objection, urged by appellant's counsel to the first paragraph of appellee's complaint, is well taken and must be sustained.

2. The second objection to the first paragraph of complaint, discussed by appellant's counsel, is, that although the appellee alleged that the accident occurred, and the injury was received, without fault or negligence on his part, yet the specific facts, stated in his complaint, showed that he was guilty of such contributory negligence as would defeat his cause of action. The specific facts were, that when appellee arrived at appellant's tracks on North street, he found the main track blocked by a standing train, that he drove his horse and carriage across the side-track, and waited between the tracks for the moving of the train, and that "the night was dark and foggy, making it impossible to discern objects a short distance." From these facts it might well be presumed, we think, that

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appellee was negligent in driving his horse and carriage between the tracks while waiting for the moving of the train. But the presumption is one of fact, and not of law, and we can not hold that this presumption ought to overcome or outweigh the positive averment of appellee to the contrary. It is true that the case of *Cincinnati, etc., R. R. Co. v. Peters*, 80 Ind. 168, seems to support the position of appellant's counsel, but the case in hand is easily distinguishable from the case cited. The second objection to the first paragraph of complaint is not sustained.

We are of opinion, however, for the reasons given in considering the first objection above stated, that the trial court erred in overruling appellant's demurrer to the first paragraph of appellee's complaint. Upon the questions we have considered, the averments of the second paragraph of the complaint do not differ materially from those of the first paragraph, and, therefore, we must hold that the trial court also erred in overruling the demurrer to the second paragraph of complaint.

Other errors have been assigned and elaborately discussed by counsel on both sides, but we need not now consider or decide them.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrers to each paragraph of complaint, and for further proceedings, etc.

Filed Nov. 24, 1885.

104	70
127	575
104	70
129	345
104	70
136	316
104	70
140	497
104	70
149	143
149	144

No. 11,253.

RIEHL ET AL. v. THE EVANSVILLE FOUNDRY ASSOCIATION.

PRINCIPAL AND AGENT.—*Book-keeper.*—*Trust.*—*Embezzlement.*—A book-keeper or salesman, who receives the money of his employer by virtue of his employment, receives it in a fiduciary capacity, and if he fraudulently appropriates it to his own use, he is guilty of a breach of trust.

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SAME.—*Property Purchased with Embezzled Money.*—*Equity.*—Where an agent, in violation of his trust, uses the money of his principal in the purchase of property, the law implies a trust in favor of the principal, and equity will subject such property to the latter's claim as against either a volunteer or a fraudulent grantee.

SAME.—*Judgment for Amount Due in Excess of Value of Property.*—The beneficiary can not follow the trust into the property purchased by the agent and also compel payment of the money from the latter; but he may obtain a judgment for the sum remaining due after deducting the value of the property, and in one action secure both equitable and legal relief.

EVIDENCE.—*Undertaking to Defraud.*—*Admissions.*—Where two persons unite in a common undertaking to defraud another, the admissions of one are competent against both, although there is no direct evidence of a conspiracy.

SAME.—*Sufficiency in Civil Cases.*—It is sufficient in all civil cases that the evidence supplies reasonable grounds for inferring facts essential to a recovery.

SAME.—*Admission without Objection.*—*Practice.*—Evidence admitted without objection in the trial court can not be questioned on appeal.

From the Vanderburgh Circuit Court.

C. Denby, D. B. Kümmler, A. Gilchrist and C. H. Butterfield, for appellants.

J. S. Buchanan, H. C. Gooding and C. Buchanan, for appellee.

ELLIOTT, J.—The substantial averments of the appellee's complaint are these: Frederick A. Riehl was the appellee's book-keeper and salesman, and, in that capacity, received of its money six thousand dollars, which he embezzled; with the money embezzled he bought real estate, caused the title to be made to his wife, and built a house on the real estate so purchased and conveyed to her; that she had no money of her own with which to purchase the property, but, with knowledge of her husband's fraudulent appropriation of his employer's money, took the title to the property for the purpose of defrauding his employer.

A book-keeper or salesman, who receives the money of his employer by virtue of his employment, does receive it in a fiduciary capacity, and if he fraudulently appropriates it to

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his own use, he is guilty of a breach of trust. The funds which come into the hands of an agent for his principal are trust funds, and the latter, as the beneficiary, becomes in equity the owner of the property purchased by the agent with these funds. Where one occupies the position of a trustee, either by express appointment or by implication of law, and wrongfully uses the money received by him as trustee in the purchase of property, the beneficiary may follow it into the property. *Pomeroy Eq. Juris.*, section 1051; *Story Eq. Juris.*, section 1260; *Bank of America v. Pollock*, 4 Edw. Ch. 215; *Taylor v. Plumer*, 3 M. & S. 562; *Pugh v. Pugh*, 9 Ind. 132; *Newton v. Porter*, 69 N. Y. 133 (25 Am. R. 152).

"The trust," says Mr. Bigelow, "will follow the estate into the hands of all purchasers with notice, and of volunteers or persons taking by gift or descent from the trustees." *Bigelow Eq.* 63.

In this instance, Mrs. Riehl was a volunteer, and had notice of the trust. Clearly enough, she can not successfully resist the effort of the beneficiary to follow the money into the property conveyed to her.

The complaint is not one by a creditor to set aside a fraudulent conveyance of property, but is one to enforce a trust arising by implication of law. Where an agent, in violation of his trust, uses the money of his principal, the law implies a trust in favor of the principal, and to enforce the trust thus implied equity will subject the property purchased to the claims of the principal, as against either a volunteer or a fraudulent grantee. It is this equitable principle which the complaint invokes.

Cases are cited holding that where an agent embezzles money from his employer and invests it in property, the principal can not follow the trust into the property, because the remedy against the agent is by a criminal prosecution. *Campbell v. Drake*, 4 Ire. Eq. 94; *Pascoag Bank v. Hunt*, 3 Edw. Ch. 583.

We have no doubt that these cases were not well decided.

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They are in conflict with the very great weight of authority, and are unsound in principle. The fact that the agent may be criminally prosecuted does not affect the right of the principal to get back his money. With quite as much reason might it be urged that the principal could not take from the embezzler the money, if found on his person, because he can be punished by a criminal prosecution, as to urge that the principal can not follow the trust because the embezzler is liable to be punished by a prosecution at the instance of the State. There is no conceivable reason why the wronged employer may not secure his money and the embezzler be also punished. The punishment is not to vindicate or reward the principal, but to protect the community from the criminal acts of embezzlers.

We agree with counsel that the beneficiary can not follow the trust into the property purchased by the agent, and also compel payment of the money from the agent. *Barker v. Barker*, 14 Wis. 142; *Murray v. Lylburn*, 2 Johns. Ch. 441. But that question does not arise in this case. Here the beneficiary seeks to subject the property bought with the trust funds to its claims, and does not seek to coerce the agent to also refund the money embezzled. The rule of which we are speaking does not forbid the beneficiary from obtaining a judgment against the agent for the sum remaining due after deducting the value of the property, and, under our system, the plaintiff in such a case as this may, in one action, obtain both equitable and legal relief. This is what the complaint seeks, and it is not vulnerable to a demurrer, even though it may demand too much, for a complaint sufficient to entitle the plaintiff to some relief will repel a demurrer.

The declarations of Frederick Riehl were unquestionably admissible against him, and this statement disposes of the point made upon the ruling of the court on this question. But there is another reason supporting the ruling of the court. Where two persons unite in a common undertaking to defraud another, the admissions of one are competent against both,

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although there is no direct evidence of a conspiracy. It is not necessary that there should be positive evidence of a conspiracy; it is sufficient if the circumstances show that the parties had embarked in a joint undertaking to commit a wrong.

It is sufficient in all civil cases, that the evidence supplies reasonable grounds for inferring facts essential to a recovery. *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476; *Evansville, etc., R. R. Co. v. Mosier*, 101 Ind. 597.

The evidence in this record very clearly and satisfactorily supplies grounds for inferring that the agent used the money of his employer in buying the property sought to be charged with the trust, and we do not doubt that the trial court did right in decreeing that the property was bought with trust funds fraudulently appropriated by the agent.

It was clearly proved by parol that the real estate was conveyed to Mrs. Riehl. Doubtless, the proper method of proving this fact was by introducing the deed, but the parol evidence was not objected to, and its efficacy can not now be questioned. *Stockwell v. State, ex rel.*, 101 Ind. 1.

The party who permits evidence to go in without objection can not successfully urge on appeal that it is not sufficient to sustain the finding. The spirit of our system of civil procedure is, that parties must present their objections in the trial court and reserve seasonable and effective exceptions. *City of Evansville v. Martin*, 103 Ind. 206. This is a wise rule; just in its operation and salutary in its effect. It secures a fair and open contest, and prevents undue advantage from being taken by the concealment of objections from the trial court. It enables that court, and the parties, to correct errors, and thus prevent appeals in cases destitute of substantial merit. The rule is not an arbitrary or technical one, but it is a liberal rule, tending to secure just results and to confine litigation to the courts of original jurisdiction.

It has been held in a great number of cases, that this court can not, and will not, weigh the evidence, but will accept

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that taken by the trial court as trustworthy. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464, and authorities cited.

Acting upon this rule, we must accept the evidence which commended itself to the judgment of the trial court, and, doing this, we must sustain the finding, for there is evidence, either direct or circumstantial, sustaining it upon every material point.

It is assumed in the supplemental brief of counsel, that the money which bought the lot and built the house was received by Frederick A. Riehl from George Naab; that there is testimony to this effect we grant, but it is opposed by strong circumstances and by direct evidence. That Frederick A. Riehl fraudulently appropriated the money of his employers, is satisfactorily shown by admissions, by the manner in which the books were kept, and by his letters directing that remittances should be made to him individually. That Riehl did dishonestly get his employer's money we do not doubt, and that it went to purchase the property which was conveyed to his wife we are well satisfied.

There can be no doubt as to the property which the money purchased and improved, for it is spoken of by the witnesses as the property described in the complaint. There was no other property in controversy.

Judgment affirmed.

Filed Nov. 24, 1885.

No. 12,220.

SCOTT ET AL. v. MILLIKAN.

TAXES.—Insufficient Description in Tax Deed.—Purchaser's Right to Enforce Lien on Land.—A lien for the amount paid at a tax sale and for subsequent taxes may be enforced against the land by the purchaser, where by mistake the land is erroneously and insufficiently described in his deed, except in the cases provided in sections 6487, 6488, R. S. 1881, and

104	75
134	969
104	75
139	406
104	75
143	82
104	75
156	629

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sections 6496, 6497, R. S. 1881, as amended by the act of 1883, Acts 1883, p. 95.

SAME.—Action to Enforce Lien, when Brought.—Premature Execution of Deed.

—In such case, a purchaser at such a sale may, after the expiration of the two years allowed for redemption, maintain an action to enforce a lien for the amount paid; and the fact that the county auditor executed a deed to such purchaser a year before the expiration of the time allowed for redemption, will not prevent the enforcement of the lien, such deed being on that account and by reason of the imperfect description invalid and ineffectual to convey title.

SAME.—Burden of Issue and Proof.—In such case, the burden is not upon the plaintiff either to allege or prove that the land was liable to taxation, that it had been assessed, that the taxes were unpaid at the time of the sale, or that there had not been a redemption from the sale, as in all these matters the burden is upon the party resisting the enforcement of the lien to show the contrary.

From the Madison Circuit Court.

M. A. Chipman, for appellants.

C. L. Henry and *H. C. Ryan*, for appellee.

ZOLLARS, J.—On the 29th day of December, 1883, appellee filed an amended complaint against appellant *Amanda J. Scott*, and her husband, to enforce a lien for taxes upon her land, which he had bought at a tax sale. Their demurrer to that complaint was sustained; he excepted, and declining to further amend, judgment was rendered against him.

This action was commenced in March, 1884, is grounded upon the assigned error of the court in sustaining the demurrer, and the object of it is to have a review of the proceedings and a vacation of the judgment. A copy of the complaint to which the demurrer was sustained, together with the demurrer and all the proceedings in the case, are incorporated and made a part of the complaint in this action. To this complaint appellants filed a demurrer, which, over their objection and exception, was overruled, and the judgment which had been rendered against appellee was vacated and set aside.

If the original complaint is sufficient, this action of the court is correct; if that complaint is not sufficient, the court

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erred in overruling appellants' demurrer to the complaint in this action and in vacating the judgment. The question for decision upon this appeal, therefore, is, does the original complaint state facts sufficient to constitute a cause of action?

The material portions of the complaint may be summarized as follows: Prior to and on the 9th day of February, 1880, one William Wilson was the owner of the S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. 20, T. 20 N., R. 7 E. "Through the mistake, error, oversight and inadvertence of the auditor of Madison county, said real estate above described was placed upon the tax duplicate in the name of said William Wilson, and was so carried forward from year to year on the tax duplicate of said county, * * * by the following incorrect, insufficient and erroneous description, to wit: A part of the west half of the southeast quarter of section 20, township 20 north, range 7 east, 40 acres, more or less, in Madison county, Indiana, which erroneous description was intended to cover and embrace the real estate first above described, and was the only real estate upon the duplicate and taxed in the name of said William Wilson for the years for the taxes on which the same was sold. * * * Said William Wilson did not own any real estate in said county other than that first above described, and the same was not taxed nor paid in the name of any other person." On the 9th day of February, 1880, the real estate so owned by Wilson, and by the incorrect description, was among the lands returned delinquent for the non-payment of State and county taxes, and on that day, at a general sale by the county treasurer of such delinquent lands, appellee bought the Wilson land, and paid therefor \$140.87, "the same being the amount due thereon for State and county taxes, costs, interest and penalties." In pursuance of the sale, and upon the day thereof, the treasurer executed and delivered to appellee a certificate of purchase. On the 15th day of February, 1881, the county auditor made and delivered to appellee a deed for the land so sold. This deed was recorded on the same day.

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The erroneous and insufficient description was carried into the notice of sale, the certificate and deed, although the intention was to cover and convey the said land owned by Wilson. Subsequent to the deed, appellant Amanda J. Scott became the owner of the Wilson land, and still owns it. It is further averred that by reason of the imperfect and insufficient description of the land, the tax deed is not sufficient to convey the title. The prayer is, that the amount paid at the tax sale, and \$29.53 taxes alleged to have been subsequently paid by appellee, shall be declared to be a lien upon the land, and that the lien be enforced by a sale of the land, etc.

The demurrer, of course, admits all of the facts sufficiently pleaded in the complaint.

The substance of appellant's objections to this complaint, as presented by her counsel, is, that by the averments therein it appears that the tax deed was prematurely issued, and that the complaint should, but does not, contain the averments that the Wilson land was liable to taxation; that it had been assessed; that the taxes were unpaid at the time of the sale; and that there had been no redemption from the sale. If land is not liable to taxation, or if liable the taxes have been paid before sale, or if after sale the land has been redeemed, the purchaser can not enforce a lien for any amount that he may have paid. 1 R. S. 1876, pp. 124, 129, sections 228, 229, 256, 257; R. S. 1881, sections 6487, 6488, and sections 6496, 6497, as amended by the act of 1883, Acts 1883, pp. 95-6. With these exceptions, it is well settled by the adjudications of this court that a lien for the amount paid at a tax sale, and for subsequent taxes paid by the purchaser, may be enforced against the land in favor of the purchaser, where, as in this case, by mistake, the land is erroneously and insufficiently described. *Cooper v. Jackson*, 71 Ind. 244; *Cooper v. Jackson*, 99 Ind. 566; *Sloan v. Sewell*, 81 Ind. 180; *Reed v. Earhart*, 88 Ind. 159; *Peckham v. Millikan*, 99 Ind. 352. See, also, 1 R. S. 1876, p. 124, section 229; R. S. 1881, section 6488; Acts 1883, p. 95, sections 2 and 3.

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It has been held, and properly so, that these statutes do not authorize the purchaser at a tax sale to institute proceedings and enforce such a lien and recover the increased penalties during the two years allowed for redemption, but that in an action by the land-owner, even before the expiration of the two years, the purchaser will be protected. *Montgomery v. Aydelotte*, 95 Ind. 144; *Reed v. Earhart*, *supra*. See also *Brown v. Fodder*, 81 Ind. 491. In the case before us, there is no attempt to enforce the lien before the expiration of the two years allowed for redemption. As we have seen, the land was sold in February, 1880. There was no redemption, nor attempt to redeem. This action was not commenced until December, 1883. The deed, however, was executed one year before the time for redemption had expired, and hence one year too soon. It is said by counsel for appellee, that the averment in the complaint, that the deed was made in 1881, is a clerical mistake, and that the deed was, in fact, not made until after the expiration of the two years allowed for redemption. However that may be, we must dispose of the case as it is presented by the record. Sections 256 and 257, R. S. 1876, p. 129, provided in substance, as do sections 6496 and 6497, R. S. 1881, as amended by the act of 1883, Acts 1883, p. 95-6, that if any conveyance, made by the county auditor pursuant to a sale made for the non-payment of taxes, shall prove to be invalid and ineffectual to convey title, the lien which the State may have on the lands sold shall remain in full force, and shall be transferred by such deed to the grantee, who shall be entitled to enforce it and all subsequent taxes by him paid against the land. Unless the fact that the deed was made a year before the expiration of the time allowed for redemption, is in the way, the complaint under consideration makes a case clearly within the provisions of the above statutes.

The purpose of these statutes is to facilitate the collection of taxes, by inflicting penalties upon the delinquent owner,

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and holding out a reward to the purchaser. The deed here was made in pursuance of the sale, and as a means of perfecting title through the sale, but it was prematurely made. It was, therefore, and by reason of the imperfect description of the land, invalid and ineffectual to convey title. It would have been no more nor less a deed, nor more nor less invalid and ineffectual to convey title, had it been made but a day or half a day before the expiration of two years from the date of the sale, nor would it, in this case, have been more effectual to convey title, had it been made a day or a year after the expiration of the two years. Neither would appellant have occupied a better position had appellee discarded the deed and taken another after the expiration of the time allowed for redemption. The deed was made by the county auditor. It was made in pursuance of a sale made for the non-payment of taxes. It is invalid and ineffectual to convey title. The case is, therefore, one that the above statutes were intended to and do cover. See *Locke v. Catlett*, 96 Ind. 291. In a case like this, under the above statutes, the burden is not upon the plaintiff either to allege or prove that the land was liable to taxation, that it had been assessed, that the taxes were unpaid at the time of the sale, or that there has not been a redemption from the sale. As to all of these matters, the burden is upon the party resisting the enforcement of the lien to show the contrary. This has been held to be the rule in the assertion of title through a tax sale and deed, and in cases like this. *Cooper v. Jackson, supra*; *Earle v. Simons*, 94 Ind. 573.

We think that the court below ruled correctly in overruling appellant's demurrer to the complaint for review, and that the judgment should, therefore, be affirmed.

Judgment affirmed, with costs.

Filed Nov. 24, 1885.

Lucas v. Coulter et al.

No. 12,158.

LUCAS v. COULTER ET AL.

104	81
135	280
137	94
104	81
155	177

PARTNERSHIP.—*Liability of New Partner on Contract Previously Made by Other Partner.*—*Ratification.*—*Novation.*—One who, after becoming a member of a firm, upon a sufficient consideration, expressly or by implication, adopts, while it is executory, a contract previously made by the other partner, and such contract is treated by both contracting parties as one made with the firm, the new partner will be liable the same as if it had been made with the firm in the first instance.

LANDLORD AND TENANT.—*Implied Warranty as to Fitness of Premises.*—Upon the letting of a house or store-room, there is no implied warranty that it is or shall continue to be fit for the purpose for which it is let. The tenant must determine for himself the safety and fitness of the premises.

From the Clinton Circuit Court.

J. V. Kent, J. W. Merritt, O. E. Brumbaugh, J. Claybaugh and G. Sexson, for appellant.

A. E. Paige and S. O. Bayless, for appellees.

MITCHELL, J.—In the complaint in this case it was alleged that the plaintiffs had leased certain premises in the city of Frankfort to the defendants, Weaver & Lucas, for the term of one year, from December 1st, 1882, at an annual rental of five hundred dollars; that they, as partners, occupied the premises, and that there remained due from them the sum of three hundred and thirty-three dollars and thirty-three and one-third cents for rent.

Lucas answered separately in two paragraphs:

First. The general issue.

Second. By way of counter-claim, in which it was averred that the room was occupied by himself and partner, under a verbal lease made between plaintiff and his co-defendant, Weaver, prior to the formation of the partnership; that the room was rented and occupied for the purpose of manufacturing and selling therein musical instruments, and that, on account of the defective manner of its construction, it was unfit for that purpose; that the roof and ceiling were so defectively

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constructed as that from rain coming through the roof, and from sand and other substances falling through the crevices in the ceiling, their instruments were damaged in the sum of five hundred dollars; that the plaintiffs, although notified, neglected to repair, and that the defendants being unable to occupy, delivered up possession of the premises in March, 1883.

Issue was taken by a reply in denial. Trial by the court; finding and judgment, over a motion for a new trial, for the amount claimed in the complaint.

The complaint counts upon a lease to Weaver & Lucas, and for rent due under a lease to the firm. It is contended that the proof shows a lease to Weaver alone, and that, in consequence, neither the finding nor complaint is sustained by the evidence.

The evidence tends to show that before the partnership was entered into, the room, which was not yet completed, was leased by parol to Weaver for one year at an agreed rental of five hundred dollars. The time of payment was not definitely agreed upon. The term was to commence when the building was completed. Before the building was completed, Lucas informed the plaintiffs that he was about to become a partner with Weaver. He inquired of them, and was informed, concerning the amount of rent to be paid.

About the 1st of December, 1882, the building having been completed, Weaver & Lucas formed a partnership and took possession. The room was furnished with chandeliers, hanging lamps, etc., by the firm. When the rent for the month of December was paid, the plaintiffs suggested that the next month's rent should be paid in advance. They were informed by Weaver that Lucas objected to this. The rent paid after that was paid by Lucas. Subsequently, Weaver, in the presence of Lucas, informed the plaintiffs that he had sold out to Lucas, and that they must look to him for the rent. Lucas made no objection. Lucas also informed the plaintiffs that he had bought Weaver's interest, and said further that if

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he should conclude to give up the room before the end of the year, he would make some satisfactory arrangement with them about it.

It is true, as contended, that one partner can not be held liable on a contract made with the other before he became a member of the firm. It is also true, that if, upon a sufficient consideration, the new member by implication adopts the contract before it is performed, and it is treated by both contracting parties as a contract, not with the partner with whom it was originally made, but as one made with the firm, the new partner will be liable, the same as if it had been made with the firm in the first instance.

The liability of an incoming partner in such cases is stated in Story on Partnership, section 153, as follows: "Indeed it may be generally stated that in all cases of this nature the primary consideration is not so much to ascertain between what parties the original contract was actually made, as it is to ascertain whether there has subsequently been, with the consent of all the parties, any change or extinguishment of that contract."

Where it is established that a contract made with one is, while it remains executory, adopted or ratified by the consent of both contracting parties, by a firm of which the one becomes a member, the old contract is thereby extinguished, and it becomes the contract of the firm, upon the principles of novation. Applying these principles to the case under consideration, it results that upon the evidence the court may well have found that the verbal lease to Weaver was by consent extinguished, and that it was adopted, with the consent of plaintiff, by Weaver & Lucas, as a lease to the firm. This conclusion would seem almost irresistible when the fact is considered that upon the dissolution of the firm, Lucas, with the other liabilities, assumed the liability of the firm to the lessors. In this view of the case, the evidence sustains the finding and complaint.

The court excluded evidence tending to support the coun-

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ter-claim. The defendant offered evidence tending to prove that after the room was occupied for a time, the ceiling—having been made of green lumber—shrunk from the effect of heat. As it was not proposed to prove that there was any fraudulent misrepresentation or concealment concerning the state of the premises at the time of the letting, this evidence was properly excluded. Whatever may be said of cases in which fraud or concealment intervenes, it is clear that upon the letting of a house or store there is no implied warranty that it is or shall continue fit for the purpose for which it was let. Taylor Landlord and Tenant, section 382; Wood Landlord and Tenant, section 317.

In the case of *Purcell v. English*, 86 Ind. 34 (41 Am. R. 255), this question was considered. It was there held that no warranty would be implied as to the condition of demised premises, "and that the tenant must determine for himself the safety and fitness of the premises for use and occupancy."

The lessors, having come into no contract to keep the premises in repair, were not liable for damages arising from defects in the building, which the appellant sought to prove.

There is no error in the record, and the judgment is affirmed, with costs.

Filed Nov. 24, 1885.

104	84
137	518

104	84
1187	255

104	84
170	556

No. 12,159.

HINKLE v. FISHER.

CONTRACT.—Statute of Frauds.—Performance within Year.—It must affirmatively appear by the terms of a contract, that its stipulations are not to be performed within a year after it is made, in order to bring it within the provisions of the statute of frauds. Section 4904, R. S. 1881.

SAME.—Parol Contract Involving Fifty Dollars.—That part of the statute of frauds (section 4910, R. S. 1881), declaring contracts involving fifty dollars or more to be void in certain cases, has reference to the sale of

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goods, the price of which amounts to fifty dollars or more, and not to contracts of a different character.

SAME.—Performance.—Performance of a parol contract, involving over fifty dollars, will take it out of the statute of frauds.

From the Randolph Circuit Court.

T. Shockney, for appellant.

S. M. Whitten, for appellee.

NIBLACK, C. J.—Action by Jacob Fisher against Squire J. Hinkle for damages alleged to have resulted from the non-performance of a parol contract. A demurrer having been first overruled, a jury returned a verdict for the plaintiff, assessing his damages at \$65, and judgment followed upon the verdict.

The only question presented upon this appeal is, did the circuit court err in overruling the demurrer to the complaint?

The complaint charged that in March, 1882, the board of commissioners of the county of Randolph, in this State, upon the petition of the defendant Hinkle and others, made and entered of record an order for the construction of a free gravel and turnpike road, in said county, upon a certain route, particularly specified in such order; that the defendant was the owner of a farm, containing about seventy acres of land, upon the proposed line of such gravel and turnpike road, which would be greatly improved by the construction of such road; that consequently said road when completed would constitute a work of great pecuniary value to the defendant, all of which was well known to the defendant; that thereafter, by proper advertisements, bids were invited for the construction of such gravel and turnpike road; that thereupon the defendant, in the form of a bid, proposed to construct section twelve (12) of such road for the sum of \$696.36; that inasmuch as there had been no bids for some parts of the proposed line of road, it was agreed between all interested that the entire line should be readvertised for bids, with the understanding that in certain contingencies the bids made and

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filed under the first advertisement should be accepted and held to be mutually binding; that the defendant, being extremely anxious to have the road constructed, solicited the plaintiff to make a bid for the work to be done on said section twelve (12) under the new or second advertisement, and as an inducement to him, the plaintiff, to propose to do such work at the same price which he, the defendant, by his previous bid had offered to perform, promised to pay the plaintiff the additional sum of \$3.64, so as to make the contract price equal to \$700, and to furnish, free of charge, all the timber which might be needed in the construction of culverts on said section twelve (12), and also promised to likewise furnish, free of charge, all the gravel necessary for the building and completion of said section twelve (12) of the road in question; that fully relying upon the inducements thus held out, and the promises so made to him by the defendant, the plaintiff, on the 10th day of June, 1882, made and filed his bid under said new or second advertisement, proposing to do the required work on said section twelve (12) for the said sum of \$696.36, and also filed a good and sufficient bond to secure the proper execution of his contract in the event of the acceptance of his bid; that his bid was thereafter, and in due time, accepted; that the plaintiff then entered upon the work which by his contract he had agreed to perform; that the defendant, although expressly requested, had failed and refused to pay said sum of \$3.64, so as to make the contract price of such work equal to \$700, and also had failed and refused to furnish any gravel to be used in the construction of such work; that by reason of the failure and refusal of the defendant to make good his inducements held out as above stated, and especially of his failure and refusal to furnish the amount of gravel he had promised to furnish, or any part thereof, the plaintiff was compelled to construct and complete the work required by his contract to be performed, at a loss to him of \$183.64; whereas, if the defendant had fully performed all his agreements and promises, he, the

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plaintiff, would have realized a profit of \$150. Wherefore damages were demanded in the sum of \$350.

The objection urged to the sufficiency of the complaint is, that the contract counted upon was void: *First*. Because by its terms it was not necessarily to be performed within a year from the time at which it was entered into. *Secondly*. Because the amount involved in the contract was presumably more than fifty dollars, and nothing was given or done at the time the contract was made to take it out of the statute declaring contracts involving fifty dollars or more to be void in certain cases, citing the 5th subdivision of section 4904 and section 4910, R. S. 1881.

As responsive to the first objection urged as above, it may be said that we have a long line of cases holding, and we have no doubt correctly, that it must affirmatively appear by the terms of a contract, that its stipulations are not to be performed within a year after the time of making such contract, in order to bring it within the provisions of the 5th subdivision of section 4904, and as nothing to that effect was affirmatively shown by the terms of the contract set out and sued on in this case, the first objection to its validity can not be sustained. *Wiggins v. Keizer*, 6 Ind. 252; *Houghton v. Houghton*, 14 Ind. 505; *Haugh v. Blythe*, 20 Ind. 24; *Marley v. Noblett*, 42 Ind. 85; *Baynes v. Chastain*, 68 Ind. 376; *Hunt v. Elliott*, 80 Ind. 245 (41 Am. R. 794); *Wolke v. Fleming*, 103 Ind. 105.

The second objection to the validity of the contract before us is equally untenable.

In the first place, section 4910, cited and relied upon by counsel, has reference to the *sale* of goods, the *price* of which amounts to fifty dollars or more. As there was no sale of property involved in the contract here in controversy, the section of the statute so cited and relied upon has no application to such a contract. In the next place, full performance of the contract in suit was averred in the complaint, and that was, in any event, sufficient to take the present case out of

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the provisions of the section of the statute lastly above referred to. *Wolke v. Fleming, supra*; 7 Wait's Actions and Defences, 46.

The judgment is affirmed, with costs.

Filed Nov. 24, 1885.

No. 10,784.

THE BALTIMORE AND OHIO AND CHICAGO RAILROAD
COMPANY v. ROWAN.

RAILROAD.—Duty of Company as to Safety of Employees.—It is the duty of a railroad company to so construct and maintain its roadway and appendages, and its overhead structures, that its employees can perform the labor required of them with reasonable safety.

SAME.—Low Bridge.—Liability for Injury to Employee Caused by.—Where a railroad company has constructed and maintains a bridge over its track with knowledge that it is of insufficient height and dangerous to its employees in the discharge of their duties, it is liable to a brakeman, ignorant of the danger, who is injured while passing under such bridge in the performance of his duties.

INSTRUCTIONS TO JURY.—Presumptions when Evidence not in Record.—Where the evidence is not in the record, a judgment will not be reversed on account of instructions given, if they would have been correct under any supposable state of the evidence under the issues. In such case, also, it will be presumed that instructions refused were not applicable to the case made.

SPECIAL FINDING.—General Verdict.—Judgment Non Obstante.—All reasonable presumptions are indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings; and where the facts specially found by the jury, construed together, are not inconsistent, but may, upon any hypothesis, be reconciled, with the general verdict, the latter must stand.

From the LaGrange Circuit Court.

H. Newbegin, B. B. Kingsbury and J. H. Baker, for appellant.

H. G. Zimmerman, R. P. Barr and J. D. Ferrall, for appellee.

104 88

132 286

104 88

134 158

136 487

136 484

104 88

139 441

104 88

143 366

104 88

147 233

104 88

152 596

104 88

153 622

104 88

168 448

104 88

169 329

104 88

171 404

The Baltimore and Ohio and Chicago Railroad Company v. Rowan.

Howk, J.—The first error of which complaint is made here on behalf of the appellant, the defendant below, are those which call in question the sufficiency of the facts stated in appellee's complaint to constitute a cause of action.

This suit was commenced in the Noble Circuit Court, in this State, but afterwards, and before trial and judgment, the venue of the cause was changed to the court below. In his complaint, the appellee alleged that appellant was a corporation, under the laws of this State, and as such owned a line of railroad running into and through Noble county, in this State, and was and had been, prior to and at the time of the grievances and injury complained of, the owner of locomotive engines and trains of cars, used and employed by appellant before and at the time mentioned in the transportation of freight and carriage of passengers, on its line of railroad, into and through such county; that prior to the time of appellee's injuries, hereinafter mentioned, appellant had constructed a bridge over and across its road, in such county, at a place where it was crossed by a public highway, about one and one-half miles east of its depot in the town of Albion; that by the appellant's negligence, in keeping its railroad in repair and safe condition, at the place where such bridge was constructed, and in constructing such bridge and keeping it in safe condition for the passage of its trains, such bridge was not constructed of sufficient height above appellant's railroad to permit the brakemen on its freight trains to stand at the brakes at their proper and necessary places on top of freight cars, and perform their necessary duties, while such trains were moving on and along its railroad through and under such bridge, without great danger to the persons and lives of its brakemen on such freight trains.

And the appellee further alleged that at and prior to the commission of the injuries thereafter mentioned, appellant and its agents and servants well knew, and, by the exercise of reasonable diligence, might have known, of the improper construction and insufficient height of the bridge aforesaid, and

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that it was dangerous for brakemen to stand on the top of freight cars of the kind known as "refrigerator cars," while appellant's freight trains drawing such refrigerator cars were passing on its railroad, through and under such bridge, on account of insufficient height of such bridge and the want of sufficient space between the top of such refrigerator cars and the overhead timbers of the bridge, while passing thereunder; that appellant further knew that the proper and necessary place for a brakeman, on such freight cars and trains, as the one on which appellee stood and was employed by appellant at the time and place, and in the manner thereafter stated, and was, while in the performance of his duties as such brakeman, on the top thereof; and that appellant well knew that it was highly dangerous for a brakeman to perform the duties required of him, and remain on the top of such refrigerator cars, while its train of such cars was passing through or under such bridge.

And the appellee averred that, on the 29th day of June, 1878, he being then in appellant's employ as a brakeman on one of its freight trains on its railroad, in such county, for a certain hire to be paid him by appellant for his services as such brakeman, the appellant did, on the day named, at Garrett, in such State, order and direct appellee to take his proper place on top of one of appellant's freight cars of one of its freight trains, then running between such town of Garrett, through Noble county to the city of Chicago, on appellant's railroad; that such freight train was composed in part of certain freight cars, known as "refrigerator cars," which were placed in the section of such train upon which by appellant's rules it became the duty of appellee to take his place as such brakeman, and upon the top thereof to do and perform the labor and services required of him as such brakeman; that the appellee being then and there ignorant of the improper construction of the bridge over appellant's railroad, at the place aforesaid in Noble county, and being ignorant of the negligent maintenance and repair of such bridge

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by appellant's servants and agents, and being wholly ignorant of the insufficient height of such bridge over such railroad, all of which facts were well known at the time to appellant and its servants and agents, he, the appellee, then and there, at the time and place aforesaid, took his proper place at the brake on top of one of the refrigerator cars, on appellant's train of freight cars, then and there running west through Noble county and under such bridge; that, on the day last named, while appellee was in appellant's employ as such brakeman, and in the discharge of his duties on such freight train, and while such train was running through Noble county and under such bridge, and while he was at his proper place and post of duty on such cars in the discharge of his duties, and while such train was under the charge of one of appellant's servants as conductor, and without any fault or negligence of the appellee, he, the appellee, was struck with great force and violence by one of the overhead timbers of such bridge upon his head, whereby he was badly bruised and wounded in his head and rendered apparently lifeless for a long time, and whereby his skull was fractured and his nervous system greatly injured, and, by reason of such wounds and bruises, he was for a long time, to wit, five weeks, rendered sick and was disabled from work, and during all such time suffered great bodily pain and distress of mind, and was compelled to expend, to wit, \$500 for nursing and medical attendance, etc., to his damage \$10,000. Wherefore, etc.

It is earnestly insisted by appellant's learned counsel, that appellee's complaint does not state sufficient facts to constitute a cause of action, or to show that appellant is liable to him for the injuries he received while in its service and in the proper discharge of the duties of his employment. After criticising the complaint at some length, appellant's counsel say: "In short, setting aside a jugglery of words respecting negligence, the allegations of the complaint would fix the fellow servants of the appellee with negligence, such as would

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avoid liability on the part of the appellant, because the accident, on these allegations, may well be held to have been caused by the negligence of fellow servants, and hence he should not recover. We repeat, there is nothing showing anything more than a sheer assumption of risk, on the part of the appellee, which risk was not latent, and, plain to be seen, not increased." It must be confessed that the position of appellant's counsel, in regard to the non-liability of the railroad company to its employee, in such a case as the one at bar, seems to be sustained by the decisions of the courts of last resort in several of our sister States. We cite some of these cases, as follows: *Baylor v. Delaware, etc., R. R. Co.*, 40 N. J. 23 (29 Am. R. 208); *Baltimore, etc., R. R. Co. v. Stricker*, 51 Md. 47 (34 Am. R. 291); *Devitt v. Pacific Railroad*, 50 Mo. 302; *Pittsburgh, etc., R. R. Co. v. Sentmeyer*, 92 Pa. St. 276 (37 Am. R. 684); *Clark's Adm'r v. Richmond, etc., R. R. Co.*, 78 Va. 709 (49 Am. R. 394); *Gibson v. Erie R. W. Co.*, 63 N. Y. 449 (20 Am. R. 552).

In this connection we may properly note that in Beach on Contributory Negligence, section 134, in speaking of these decisions, it is vigorously said: "If the roof or overstructure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man-traps."

The case in hand is one of first impression in this State, and we are not concluded by any previous decision of this court. We are impressed with the opinion that appellant's counsel misapprehend the force and effect of the facts stated in appellee's complaint, and admitted to be true, as the question of their sufficiency is now presented. Stripped of the "jugglery" of adjectives or qualifying words, the material facts admitted to be true were, (1) the construction and main-

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tenance by appellant of the highway bridge over its railroad track, at an insufficient height to enable its brakemen to perform their labors and discharge their duties, without great danger and hazard to the life and personal safety of such brakemen, (2) appellant's knowledge of the insufficient height of such bridge, and that it was dangerous and unsafe for its brakemen to perform their labor and discharge their duties while passing under such bridge, (3) appellee's ignorance of the facts, that the bridge was too low, and that it was dangerous for him to attempt the performance of the duty imposed on him as a brakeman by the appellant, while passing under such bridge, and (4) appellee, while in appellant's employ as brakeman, in his proper place and at his post of duty, was struck by the bridge, under which his train was running, and received the injuries described in his complaint.

It will not do, we think, to say that these facts were not sufficient to constitute a cause of action against appellant for the recovery of such damages as appellee sustained. It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employee or servant can do and perform all the labors and duties required of him, with reasonable safety.

In *Houston, etc., R. W. Co. v. Oram*, 49 Texas, 341, it was held by the Supreme Court of Texas as follows: "It is the duty of the railroad company to use ordinary care to provide such cars, road-bed, tanks, etc., as are reasonably safe; that a failure to do this, is negligence chargeable on the company itself; and that the company is responsible in damages to an employee for an injury resulting, without his negligence, from a tank or other appendage of the road so negligently constructed as to subject the employee to unnecessary and extraordinary danger which he could not reasonably anticipate or know of, and of which he in fact was not informed."

Doubtless, the general rule is, as it was declared to be by Chief Justice SHAW, in the leading case of *Farwell v. Boston*,

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etc., *R. R. Co.*, 4 Met. (Mass.) 49, as follows: "He who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services." But there are well defined exceptions to this general rule, one of which arises from the obligation or duty of the master not to expose the servants while conducting his business to perils or hazards which might have been provided against by the exercise of due care and proper diligence upon the part of the master. In *Chicago, etc., R. R. Co. v. Swett*, 45 Ill. 197, it was held by the Supreme Court of Illinois, that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if, from a defective construction of its road and appurtenances, an injury happen to one of its servants, the company is liable for the injuries sustained. The same learned court has since re-affirmed the same doctrine, substantially, in *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183 (4 Am. R. 593), and in *Chicago, etc., R. R. Co. v. Russell*, 91 Ill. 298 (33 Am. R. 54).

In *Hough v. Railway Co.*, 100 U. S. 213, in speaking of the exceptions to the general rule, that a master is not liable to his servant for injuries sustained by the negligence of his fellow servants, the Supreme Court of the United States says: "One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter." The doctrine here declared is in harmony with and supported by the recent decision of this court in the well considered case of *Indiana Car Co. v. Parker*, 100 Ind. 181.

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We are of opinion that the facts stated in appellee's complaint are sufficient to constitute a cause of action, and that appellant's demurrer thereto was correctly overruled.

Under the alleged error of the court in overruling the motion for a new trial, the appellant's counsel first complain of the instructions given by the court to the jury trying the cause. Of these instructions counsel say: "The court gave such instructions as tended to mislead the jury and befog their minds as to the law, and leave them to grasp at any intimation, that they would be justified in finding a verdict against the defendant, a railroad company." We do not think that the instructions given by the trial court deserve this sweeping criticism at the hands of appellant's counsel. The evidence has not been made part of the record before us, and of course it is difficult, if not impossible, for us as an appellate court to judge clearly or accurately of the applicability of the instructions to the case made by the evidence. In such a case, where the evidence is not in the record, the rule has always been in this court, that a judgment will not be reversed on account of an instruction given, if such instruction could have been correct under any supposable state of the evidence which might have been introduced under the issues in the cause. *Miller v. Voss*, 40 Ind. 307; *Ohio, etc., R. W. Co. v. Nickless*, 73 Ind. 382; *Rozell v. City of Anderson*, 91 Ind. 591. Applying this rule to the case in hand, we have no difficulty in reaching the conclusion that there is no available error in the instructions given.

Complaint is made, also, of the court's refusal to give certain instructions at the request of appellant. Where, as in this case, the evidence given on the trial is not in the record, we will presume, in favor of the ruling of the court below, that the instructions asked for by appellant were properly refused, because they were not applicable to the case made by the evidence. *Freeze v. DePuy*, 57 Ind. 188; *Powers v. State*, 87 Ind. 144; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245.

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Appellant's counsel next insist very earnestly, that the trial court erred in overruling the motion for judgment, in favor of appellant, on the special findings of the jury, notwithstanding their general verdict for appellee. Fifty-eight interrogatories were propounded to the jury on the part of appellant, and twenty-nine on the part of appellee; and the jury returned, with their general verdict, answers to each and all of these interrogatories. Many, indeed we may say most, of these interrogatories required the jury to answer as to mere evidentiary facts, and not as to the facts in issue. The answers to such interrogatories were and are of little value for any purpose; for, if they were apparently inconsistent with the general verdict, they could not control it, and as evidence merely, they constitute no part of the record. *Tucker v. Conrad*, 103 Ind. 349.

The interrogatories and answers are entirely too numerous and too long to be set out in this opinion. We have carefully considered them, however, and have reached the conclusion that there is no such inconsistency between the special findings of the jury and their general verdict as entitled the appellant to a judgment in its favor on such special findings, notwithstanding the general verdict in favor of appellee. Section 547, R. S. 1881, provides: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." All reasonable presumptions are indulged in favor of the general verdict, in determining the question under consideration, while nothing will be presumed in aid of the special findings. *McCallister v. Mount*, 73 Ind. 559; *Cook v. Howe*, 77 Ind. 442; *Lassiter v. Jackman*, 88 Ind. 118.

In construing section 547, *supra*, it has been held that all the facts stated in the special findings of the jury must be taken and construed together, for the purpose of ascertaining their true legal effect, and if, when thus taken and construed, they are clearly inconsistent and can not be reconciled with the general verdict, they will control it, and the court must

The Crawfordsville and Southwestern Turnpike Company v. Fletcher.

give judgment accordingly. But where, as in the case in hand, the facts specially found by the jury, construed together, are not inconsistent, but may be reconciled, with the general verdict, the latter must stand and judgment must be rendered thereon. *Detroit, etc., R. R. Co. v. Barton*, 61 Ind. 293; *Indianapolis, etc., R. R. Co. v. McCaffrey*, 62 Ind. 552; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412. If the special finding of facts can, upon any hypothesis, be reconciled with the general verdict, the latter must stand. *Amidon v. Gaff*, 24 Ind. 128; *Woollen v. Wishmier*, 70 Ind. 108; *Carver v. Leedy*, 80 Ind. 335.

The trial court did not err, we think, in overruling appellant's motion for judgment in its favor on the special findings of the jury, notwithstanding their general verdict.

It is also claimed by appellant's counsel, that the court erred in overruling the motion in arrest of judgment. This motion called in question the sufficiency of appellee's complaint, after trial and verdict. If we are right, as we think we are, in holding the complaint good on demurrer, it is certainly good after verdict, on the motion in arrest.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

MITCHELL, J., took no part in the decision of this cause.

Filed Nov. 24, 1885.

No. 12,206.

THE CRAWFORDSVILLE AND SOUTHWESTERN TURNPIKE
COMPANY v. FLETCHER.

GRAVEL ROAD.—*Act of 1859.—Constitutional Law.*—The act of 1859, entitled "An act to prohibit the collection of tolls on gravel, turnpike, macadamized and plank roads, in certain cases, and to provide the mode of declaring charters of such roads forfeited in certain cases, and

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104	97
136	571
104	97
138	318
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162	1A
104	97
171	707

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repealing all laws inconsistent therewith," Acts 1859, p. 170, embraces but one subject, and is constitutional.

SAME.—*Amendatory Act of 1875.—Forfeiture of Franchises.—Statute Construed.*—The act of 1859, as amended by the act of 1875, Acts 1875, Reg. Ses., p. 75, confers authority on the courts to enter a judgment of forfeiture of corporate franchises, against a gravel road company, for allowing its road to be and remain out of repair for the space of six months or more.

SAME.—*Complaint to Forfeit Franchises.—Judicial Knowledge.—Presumption.*—A complaint to forfeit the franchises of a gravel road company must state when or under what law the corporation was organized, as the court can not judicially know, nor can it be presumed, that a private corporation was organized under the general law.

SAME.—*Consolidation.*—An averment in a complaint in such case, that the corporation was formed of two corporations by consolidation in 1878, and the statement by way of recital, in giving the lines of the road, that one point of the line intersects the corporate boundary of a city "as such corporate limits existed in the year 1860," do not show when the corporations were organized.

SAME.—*Rights of Consolidated Corporation.*—Under the statute authorizing gravel road corporations to consolidate, sections 3662, 3663, R. S. 1881, the consolidated corporation succeeds to the rights of the constituent corporations.

PLEADING.—*Private Statute.*—Private statutes must be pleaded, as the courts do not take judicial knowledge of them.

STATUTE.—*Rule of Construction.*—In construing a statute, courts will look to all parts of the same statute, to other statutes, and to the general principles of law, and assign such meaning to the words of the statute construed as will make them all effective, unless by so doing the purpose of the Legislature will be defeated.

From the Montgomery Circuit Court.

G. W. Paul, J. E. Humphries, P. S. Kennedy and S. C. Kennedy, for appellant.

A. D. Thomas and J. R. Courtney, for appellee.

ELLIOTT, J.—The appellee's complaint alleges that the appellant is a gravel road company, formed by a consolidation of the Crawfordsville and Alamo Turnpike Company and the Crawfordsville and Parkersburg Gravel Road Company, and that the consolidation was effected in 1878. The lines of the consolidating companies are described, and it is averred that "The defendant's road has been suffered to get and re-

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main out of repair, so as to be inconvenient for the public travel for the space of six months and more last passed; that said road is not being repaired; that plaintiff has no good reason to believe that said repairs will be speedily made, and that he is a legal voter of Montgomery county, through which the road runs."

The complaint is assailed upon several grounds, the first of which is, that the statute on which it is based is unconstitutional. This position rests upon the proposition that the statute embraces more than one subject, and is, for this reason, in conflict with the constitutional provision reading thus: "Every act shall embrace but one subject and matters properly connected therewith." In our opinion this position is untenable. The title of the act of 1859 is as follows: "An act to prohibit the collection of tolls on gravel, turnpike, macadamized and plank roads, in certain cases, and to provide the mode of declaring charters of such roads forfeited in certain cases, and repealing all laws inconsistent therewith." Acts 1859, p. 170.

The subject of this act is the effective prohibition of the right to exercise the franchise of collecting tolls. The subject of the act is general, but there is only one general subject, and that is, the effective prohibition of the collection of tolls by corporations who disregard the law. The means of effecting this purpose are diverse, but there is no want of unity on the subject. One of the means of effecting the end sought to be attained is the denial of the right to collect tolls in case the law is disregarded; the other method is by wresting from the delinquent corporation its franchises; but both of these methods are directed to the attainment of one general purpose, and are both connected with the subject of the act. A statute embracing a single subject is constitutional, no matter how fully it may enter into the details of that subject. *Warren v. Britton*, 84 Ind. 14; *Bitters v. Board, etc.*, 81 Ind. 125; *Shoemaker v. Smith*, 37 Ind. 122.

The second objection urged against the complaint is, that

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the statute, as amended in 1875, does not authorize a judgment of forfeiture, and that, for this reason, the complaint is without foundation. The argument of counsel upon this point is plainly fallacious. They assume that the amended section must be construed as if it stood alone as an independent and distinct statute, and they ignore the doctrine that courts in construing statutes will look to all parts of the same statute, to other statutes, and to general principles of law. They also lose sight of the important rule that courts in construing statutes will look to the purpose intended to be accomplished and the evil intended to be remedied. It is seldom, indeed, that courts look no further than the naked words of a statute. We have a great number of cases in our own reports illustrating and enforcing rules of construction exactly the opposite of the doctrine which counsel tacitly assume to be the correct one, among them the following: *Humphries v. Davis*, 100 Ind. 274 (50 Am. R. 788), see auth. cited, p. 284; *Swails v. Swails*, 98 Ind. 511, see p. 512; *Krug v. Davis*, 87 Ind. 590, see auth. cited p. 596; *Bell v. Davis*, 75 Ind. 314.

The purpose which the statute under examination was designed to accomplish is apparent, for it can not be doubted that the Legislature meant to provide a method for depriving corporations who are remiss in their duties of all corporate franchises and privileges. It is very evident that it was not intended to leave courts with power to render a judgment that they could not enforce, and this would be the result if appellant's view that the only judgment that the court can pronounce is, that the road is out of repair, should be adopted. We do not believe that the Legislature meant to do no more than confer authority to render a judgment that would be nugatory and not enforceable. Our opinion is that the purpose of the Legislature was to invest the court with authority to pronounce an effective judgment, and this includes the power to declare a forfeiture for the designated breach of duty.

Taking into consideration the whole statute, and looking

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to the purpose of the Legislature, we do not doubt that the power to declare a forfeiture is vested in the courts. The statute is directed against delinquent corporations, and its general purpose is to compel a performance of duty by affixing the penalty of forfeiture for a violation of corporate duties. The section of the statute under immediate mention is one of several directed to the accomplishment of one general purpose, and it prescribes one method of several of accomplishing this purpose. That the statute is intended to confer authority to enter judgment of forfeiture, and is to be taken as an act directed to the accomplishment of one general purpose, is evident from many provisions found in it. Thus, in one place it is declared, "That in all cases where the court shall declare a forfeiture under the provisions of this act, such forfeiture shall in no wise affect any right, contract, suit or liability which existed prior to such forfeiture." In another place it is provided that, "Whenever any forfeiture of chartered or incorporated rights shall be declared, under the provisions of this act, it shall be held to be a vacation of so much of said road as may be declared forfeited." These provisions, and others of a like general character, plainly show that the act is to be considered as a whole, that its general purpose is to confer authority to adjudge forfeitures, and that one section is not to be isolated from the others. In the amended section we find this clause: "*Provided, however,* such forfeiture shall only apply to so much of said road lying in such county as has been proven to be out of repair, as set forth in the second section of this act." Acts 1875, Reg. Ses., p. 75. Here is an express recognition of the unity of purpose of the act, and a full legislative recognition of the authority to pronounce a judgment of forfeiture. The clause quoted can not be disregarded nor treated as meaningless, for the general rule is, that all the words of a statute shall be deemed effective and shall have a meaning assigned them, unless by so doing the purpose of the Legislature will be defeated. Here, it is necessary to give the words a meaning,

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in order to execute the legislative intention and to effectuate the purpose of the Legislature. To refuse to assign these words a meaning would frustrate the legislative intention and violate the rule that all of the words of a statute must be given effect.

It is quite clear from the language and purpose of the amendment of 1875, that there was no intention to make a change in the general system constructed by the statute, but that it was intended to make a change only in detail, by giving the delinquent corporation an opportunity to avert a forfeiture by making repairs after the rendition of the interlocutory judgment declaring the road to be out of repair.

It is obvious that the judgment declaring the road to be out of repair is an interlocutory and not a final judgment. To declare the road out of repair is not to finally dispose of the action; some other judgment is plainly contemplated. There can be no final judgment until after the judgment declaring the road to be out of repair, and certainly the final judgment must be something more than the interlocutory one. We must hold that the statute authorizes a judgment of forfeiture, or else hold that no final judgment at all is contemplated, and such a conclusion would not only defeat the purpose of the act, but it would also do violence to its language.

In giving to the act the construction adopted, we do not insert any provisions which we think were omitted by mistake, we simply take the statute as it is written, examine all of its provisions, and, proceeding according to long settled canons of construction, ascertain and declare the intention of the law-making power. We neither add to nor subtract from the provisions of the statute, but taking them all into consideration, we give effect to the legislative intention as expressed in the statute. The case is not one in which there is such a lack of words as to render the statute ineffective or the intention of the Legislature unexpressed, for there are

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appropriate words, although not the clearest that might have been chosen, and the intention is not doubtful or obscure.

The third objection to the complaint is that it does not state under what law the corporation was organized. This objection presents a question not entirely free from difficulty. It has long been the rule in this State that in cases of this character the complaint or information must state under what statute the corporation was organized. *Danville, etc., P. R. Co. v. State, ex rel.*, 16 Ind. 456; *Covington, etc., P. R. Co. v. Van Sickle*, 18 Ind. 244. The reason for these decisions appears in the case first cited, and from the opinion there given we make this extract: "Under our statute, then, when a corporation does, or omits, acts which amount to a forfeiture of its charter, or exercises powers not conferred by such charter, an information may be sustained against it. But if the court is not made acquainted with its charter, so as to know what act it is required to perform, or omit, how can the court determine whether the corporation has been guilty in these particulars, or not? If we had but one general public statute under which plank road companies could be acting, then it would not be necessary for an information to make averments showing the law governing the given corporation, because the court would take judicial notice of it. But special turnpike and plank road charters existed under the old Constitution, and were continued in existence by the new. *City of Aurora v. West*, 9 Ind. 74; 1 R. S. 1852, p. 70. Then we had a general plank road law in 1852, which defined the powers and duties of corporations formed under it, and contained an invitation to those previously existing to adopt its provisions, in lieu of their then charters. 1 R. S. 1852, 394. In 1855, still a different general plank road law was enacted. Acts 1855, pp. 147, 148. See *The State v. Royster*, 10 Ind. 426. Further changes have been subsequently made. Now, though it is the duty of the court to judicially know the provisions of these charters enacted under the new Constitution, it is not the duty, nor is it in the power, of the court to judicially

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know the fact as to whether a given corporation was created under one, or the other; or whether, if created under one, it has subsequently accepted of the provisions of the other."

There are strong reasons supporting the rule announced in these cases. If a corporation existing under a private charter is required to construct a road in a certain manner, courts can not adjudge a forfeiture unless they are informed that the corporation has omitted to do what its charter requires, and this they can not know without information of the requirements of the charter. If private corporations are invested with rights, these can not be taken from them by subsequent statutes, and whether they are invested with such rights can only be ascertained by an inspection of their charters. Whether corporations were created by a general law or by private statute can only be determined from the facts placed before the court. Corporate franchises can not be forfeited except in clear cases, and a party who demands a forfeiture must present all the facts essential to the right to enforce a destruction of the corporate franchises. These are all important considerations, and well support our decisions. But here, too, we have a case where the rule of *stare decisis* is of controlling force. We can not, as is evident from these reasons, overrule the decisions referred to.

The cases of *House v. City of Greensburg*, 93 Ind. 533, *Besonies v. City of Indianapolis*, 71 Ind. 189, *City of Logansport v. Dick*, 70 Ind. 65 (36 Am. R. 166), *City of Brazil v. McBride*, 69 Ind. 244, *State, ex rel., v. Hauser*, 63 Ind. 155, *Town of Brazil v. Kress*, 55 Ind. 14, *Lowrey v. City of Delphi*, 55 Ind. 250, do not overrule the cases heretofore cited.

In the cases of *Danville, etc., P. R. Co. v. State, ex rel., supra*, and *Covington, etc., P. R. Co. v. Van Sickle, supra*, the question was, as here, the right to adjudge a forfeiture of corporate franchises, but in the former cases no such question was involved. In this case the life of the corporation is at stake, and a very different rule applies to such cases from

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those which obtain in ordinary actions for torts or upon contracts.

The cases relied upon by the appellee can not apply here, nor to the class of cases of which the present is a member. The general presumption is in favor of the legality of corporate acts, and certainly this presumption must be one of controlling importance in a case where a different presumption would result in the destruction of the corporation. Until the contrary appears, we must presume that there were no illegal acts, and this presumption can only be overcome by showing that the corporation wrongfully omitted to do what its charter required, or did something forbidden by law. A presumption ought not to be made that may cost a corporation its life without facts clearly and fully sustaining it. It is only in clear cases, and upon a full statement of all material facts, that a forfeiture of corporate franchises will be adjudged. An expression of this general doctrine will be found in *Moore v. State, ex rel.*, 71 Ind. 478, where it was said: "The rights, privileges and franchises of such corporations, we think, should not be declared forfeited, and they should not be ousted and excluded therefrom, except for solid, weighty and cogent reasons, for the violation of a positive and prohibitory statute, and not of a statute whose provisions are permissive and apparently directory, and never upon merely technical grounds." We hold that it can not be presumed in such cases as the present that a private corporation was incorporated under the general law, and that the complaint must show by proper averment when the corporation was organized or under what law the corporation was created.

The question remaining for decision is: Does the complaint show under what law the corporation was organized? Appellee affirms that it does, because it avers that the corporation was formed of two corporations by consolidation in 1878. The complaint shows nothing more than that there was a consolidation of two corporations; whether these con-

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stituent corporations were organized under general laws or special charters, is not stated. Consolidations can take place only by virtue of a statute, and in accordance with its provisions. The authority to consolidate may be given in the original charter or in subsequent statutes; but the legislative sanction must be given in some legal form. *Morawetz Private Corp.*, sections 544, 545; *Field Corp.*, section 387; *Booe v. Junction R. R. Co.*, 10 Ind. 93; *State, ex rel., v. Bailey*, 16 Ind. 46; *Shelbyville, etc., T. P. Co. v. Barnes*, 42 Ind. 498. It is sometimes said that the consolidation of two corporations creates a new corporation, and in a general sense this is perhaps true, but, practically, the question is one of statutory construction, the effect of the consolidation depending upon the provisions of the statute authorizing it. A recent writer thus states the rule: "The constitution or charter and the franchises belonging to a corporation formed by the consolidation of two other corporations depend wholly upon the act under which the consolidation takes place. The question whether the corporation so formed is a *new* corporation, within the meaning of a particular act of the Legislature, is merely a question of statutory construction." *Morawetz Private Corp.*, section 546. *Field Corp.* (Wood's ed.), section 394, authorities cited in note. This is substantially the rule sanctioned by our own decisions. *McMahan v. Morrison*, 16 Ind. 172; *Paine v. Lake Erie, etc., R. R. Co.*, 31 Ind. 283. The general rule is that the consolidated corporation succeeds to the rights of its constituent corporations, unless the statute otherwise provides. *Scott v. Hansheer*, 94 Ind. 1; *Indianapolis, etc., R. R. Co. v. Jones*, 29 Ind. 465; *Paine v. Lake Erie, etc., R. R. Co.*, *supra*. Even where there is no statute saving to the consolidated corporation the rights of its constituent corporations, courts can not know what the rights of the consolidated corporation are without information as to the rights and duties of the corporations of which it is composed, but the statute authorizing gravel road corporations to consolidate expressly preserves to the consoli-

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dated corporation the rights of its constituent corporations. R. S. 1881, sections 3662, 3663.

The complaint does not state any facts enabling the court to ascertain what rights passed to the corporation consolidated by the union of the two existing corporations. For aught we know, or can know, the constituent corporations may have been protected by their charters from the operation of all general laws, or their duties may have been different from those contemplated by the general law, or their charters may have provided special methods for proceeding to forfeit their corporate franchises in case of a breach of duty. We can not presume in cases where corporate franchises are sought to be destroyed, that the constituent corporations were not protected by their charters. In cases of this class pleadings are not to be construed liberally; on the contrary, they are to receive a strict construction against the party seeking to enforce a forfeiture. *Western Union Tel. Co. v. Artell*, 69 Ind. 199, see p. 202. In the case cited it was said: "The appellee insists, as the courts must notice the corporation of appellant as part of their public knowledge, that they must also know that it is 'engaged in telegraphing for the public.' We do not approve of this view. A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it."

It is urged by the appellee that the complaint shows when the corporations were organized, because in giving the lines of the road it states that one point of the line intersects the corporate boundary of the city of Crawfordsville, "as such corporate limits existed in the year 1860." Even this fact is stated by way of recital, and it is well settled that material facts must be directly averred. *Jackson School Tp. v. Farlow*, 75 Ind. 118. The facts must be stated so that the court can determine what law applies, and recitals and conclusions can not supply the place of positive averments of fact. *Hain v. North-Western G. R. Co.*, 41 Ind. 196. But even the recital

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relied on is so indefinite as to furnish no basis for ascertaining the date the corporations were created, for the corporation line referred to might have existed long anterior to 1860.

It is a familiar rule of pleading that private statutes must be pleaded, as courts do not take judicial notice of them. If a corporation exists by private statute, the courts can not take notice of the statute unless it is pleaded. Where there is no averment as to the time a corporation was organized, it is impossible for the court to determine whether the statute should or should not be pleaded, for if the date given shows that the corporation was organized under a general law, then the law need not be pleaded; but if it was organized under a special or private statute, it is otherwise. This familiar rule proves the necessity of requiring a plaintiff, who seeks to enforce so stern and severe a remedy as that of forfeiture, to aver the date of the organization of the corporation whose rights are in peril.

It is not imposing a heavy burden on the plaintiff to require him to state the date of the organization of the corporation, and it is much more reasonable to put this slight burden on him than to make presumptions against a corporation struggling to avert a dissolution.

For the defect in the complaint pointed out the judgment must be reversed.

Judgment reversed.

Filed Sept. 19, 1885; petition for a rehearing overruled Nov. 20, 1885.

No. 12,152.

THE BOARD OF COMMISSIONERS OF HOWARD COUNTY
v. JENNINGS.

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COUNTY COMMISSIONERS.—*Statement of Claim.—Evidence.*—In presenting a claim to a board of commissioners for allowance, no formal complaint is necessary; all that is required is a detailed statement of the items

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and dates of charge, under which all the evidence necessary to show the liability of the county is admissible.

SAME—Township Trustee.—Temporary Relief of Non-Resident.—Section 6089, R. S. 1881, makes it the duty of the township trustee, as overseer of the poor, on receiving information that any person, not an inhabitant of the township, is sick or in distress and without friends or money, and likely to suffer, to examine into the case and grant such temporary relief as the nature of the case may require, and of the county commissioners, if claims for such services are reasonable, to allow and order them paid; and the fact that such person is being cared for when the trustee is made aware of the necessities of the case, will not prevent the trustee from recognizing past services and providing for future needed care.

SAME—Voluntary Services.—Services rendered to a person in need of temporary relief, with the knowledge and consent of the township trustee who agreed to assist in making out a bill for such services, to be presented to the county commissioners, are not voluntary services, but under the direction of the trustee.

From the Howard Circuit Court.

M. Garrigus, for appellant.

C. E. Hendry and D. A. Woods, for appellee.

* *MITCHELL, J.*—At the December term, 1883, Margaret E. Jennings presented a claim to the board of commissioners of Howard county. She asked to be allowed for seven weeks' board, and for services in caring for Grant Davis. Her claim was disallowed by the board, and upon appeal to the circuit court it was amended, and was then stated as follows:

"Howard County, Indiana, To Margaret E. Jennings, Dr.

"For boarding, nursing and washing for Grant Davis, a person unable to sustain himself, from October 18th, 1883, to December 6th, 1883, being 7 weeks, while he was under treatment for fracture of the left leg and ankle, at \$10 per week \$70

"To 2 weeks' board, from December 6th, 1883, to December 20th, 1883, at \$5 per week 10

\$80."

The claim was duly verified, and the township trustee of Liberty township certified that the time charged for was correct.

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A demurrer was filed to the claim as amended, and there was also a motion to strike it out. Both the demurrer and motion were overruled, and it is now argued that these rulings were erroneous.

Counsel contends that the claim states no cause of action against the county, and he assigns as reasons: 1. That it does not appear that the overseer of the poor contracted with Mrs. Jennings to board and care for Grant Davis, 2. That it is not stated that Davis was an indigent person, lawfully settled in Howard county. 3. That the statement of the claim is too indefinite.

It is also argued that it appears, or may be inferred, from the statement of the claim, that the services were voluntarily performed, and that, in consequence, no appeal lies from the order of the board refusing to allow it.

In the case of *Board, etc., v. Ritter*, 90 Ind. 362, the requisites of a complaint in a cause originating before a board of commissioners were fully considered, and the ruling there, as in many other cases, is, that no formal complaint is necessary; all that is required is a detailed statement of the items and dates of charge. Upon such a statement, all the evidence necessary to show the liability of the county is admissible. *Board, etc., v. Armstrong*, 91 Ind. 528; *Board, etc., v. Gilum*, 92 Ind. 511; *Board, etc., v. Emmerson*, 95 Ind. 579.

The account filed was sufficiently formal and definite, and the demurrer and motion upon which error is predicated were properly overruled.

Upon the evidence, the court found in favor of the claimant, and gave judgment against the county for sixty-seven dollars. It is insisted that the evidence does not sustain the finding.

It appeared that Grant Davis, a boy about eighteen years old, resided at Elwood, in Madison county. In October, 1883, while engaged at work for Mr. Jennings, in Howard county, he was in some way caught by a belt in a mill and severely hurt. He sustained, among other injuries, a compound frac-

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ture of the leg. Being without means, and, so far as appears, without friends who were able to care for him, and too severely hurt to be moved any distance, he was taken to the house of Mr. Jennings, where he was confined to his bed, unable to help himself, for about seven weeks. After that he was confined to the house for about two weeks more. Mrs. Jennings and her daughter, during all this time, gave him such nursing, care and attention as his condition required. It is admitted of record that the amount claimed is reasonable.

It was clearly proved that the boy was without means, and no friends except Mrs. Jennings and her family appeared to help him or care for him.

Shortly after the injury, Mr. Jennings, at the request of his wife, saw the township trustee, and inquired of him what should be done in reference to the boy. The trustee gave no answer, but said he would see about it. Soon after, the trustee told him that the only way to do was to "lay in a bill to the county commissioners," and that the commissioners would make her an allowance, that he would certify to the correctness of the amount of services—that he would certify to the bill.

The trustee himself testified that when the injury occurred he was away from home, and did not return for some days. Shortly after his return Mr. Jennings asked how he would be paid for taking care of the boy. "I said that if the boy had nothing, no means of his own, to come down and I would assist him in making out a bill; that the allowance would have to be made by the county commissioners."

The trustee testified further that he did not ask Mr. Jennings to keep the boy, but he gave as a reason that he saw him there, and that he was not in a condition to be moved. It seems to have been assumed by the trustee that the boy would be kept and cared for by the Jennings family; and we think that from all that was said by the official they had a right to assume that their keeping him was authorized by the trustee, and that they would be paid for it.

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We think, therefore, that upon the evidence the court below may well have found, as it unquestionably did, that the services were not voluntarily performed, but that they were performed under the direction of the township trustee.

That the home of the unfortunate lad was in Madison county was no impediment in the way of a trustee in Howard affording him temporary relief. Section 6089, R. S. 1881, made it the duty of the trustee, as overseer of the poor, upon receiving information that any person not an inhabitant of the township was sick or in distress, and without friends or money, and likely to suffer, to examine into the case and grant such temporary relief as the nature of the case might require. That Mrs. Jennings had received the boy into her house, and was kindly caring for him when the trustee was made aware of the necessities of the case, did not prevent him from recognizing what she had done, and providing for future needed care.

We think, under the section of the statute above referred to, the township trustee was authorized to grant temporary relief, and that under the same section it was the duty of the board of commissioners of Howard county to examine the claim, and if found reasonable allow and order the claim paid. *Board, etc., v. Rogers*, 17 Ind. 341; *Board, etc., v. Wright*, 22 Ind. 187.

For services rendered in like cases, without the authority or direction of the township trustee, counties are not liable; but when, as in this case, such services are properly authorized, there should be no hesitancy in paying what they are reasonably worth.

That the judgment for costs was made collectible without relief may have been erroneous, but as there was no motion below to correct it, the error is not available here.

Judgment affirmed, with costs.

Filed Nov. 24, 1885.

Irwin *et al.* v. Kilburn *et al.*

No. 12,208.

IRWIN ET AL. v. KILBURN ET AL.

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133	145
133	220
104	113
142	334
104	113
152	635

PRINCIPAL AND SURETY.—*Liability of Surety.*—A surety will not be held beyond the terms of his engagement, but the latter must be reasonably interpreted.

SAME.—*Contract.*—*Bond for Performance of.*—Sureties in a bond given to secure the performance of a contract are presumed to have contracted with knowledge of and reference to the terms of such contract, and they are bound by it if valid.

CONTRACT.—*Construction of.*—*Intention of Parties.*—Courts will give a written contract such a reasonable construction as will make it effective according to the intention of the parties, and for this purpose it must be considered as a whole.

SAME.—*Uncertainty.*—*Surplusage.*—*Sureties for Performance.*—A contract to do, according to specifications, all of certain kinds of work on the line of a railroad, "in the county of ———, State of Indiana," and "that the work embraced in this contract shall be prosecuted with such force and at such places" as the other party may direct, is not, taken as a whole, void for uncertainty in not naming the county, as the words "county of ———," may be rejected as surplusage, and the contract given effect and made binding on sureties for performance.

From the Carroll Circuit Court.

R. B. F. Peirce and W. T. Brush, for appellants.

G. O. Behm, A. O. Behm, B. W. Langdon and T. F. Gaylord, for appellees.

ZOLLARS, J.—It is alleged in appellants' complaint, that during the year 1879, they were partners, and engaged, as contractors, in the construction of the Indianapolis, Decatur and Springfield Railway from Indianapolis, through the counties of Marion, Hendricks, Putnam, and to a station in the county of Parke, a distance of about forty-three miles; that as such contractors they sublet certain work to appellee Henry L. Kilburn, and entered into a written contract with him. A copy of this contract, executed by him and them, is set out in the complaint. So much of it as needs to be set out here is as follows:

"Articles of agreement, made and concluded this 26th day

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of May, in the year of our Lord, 1879, by and between H. L. Kilburn, of Lafayette, Indiana, of the first part, and Irwin & Huestes, parties of the second part, witnesseth, that for the consideration of the payment and covenants hereinafter mentioned, to be made and performed by the second party, the said party of the first part doth hereby covenant and agree to construct and furnish in the most substantial and workmanlike manner, and according to the plans and specifications of Henry C. Moore, chief engineer of the Indianapolis, Decatur & Springfield Railway Company, on file in the office of the said railway company at Tuscola, Illinois, and to the satisfaction and acceptance of said engineer, or his successors, and under his directions and under the directions of his assistants, the following work on the line of said railway in the county of _____, State of Indiana: All the pile-driving for trestling and foundations, and all the timber for trestles and foundations, and all timber we may need, and excavations for foundations. Said work to be completed by the 1st day of September, A. D. 1879. And it is mutually agreed and understood, that time is of the essence of this contract. * * * It is further agreed that the work embraced in this contract shall be prosecuted with such force and at such places as said second party may direct."

To secure the due performance of this contract, according to its terms, on the part of Kilburn, and to save the appellants from loss by reason of its violation, Kilburn, as principal, and appellees Opp and Marks as his sureties, executed a bond in the penalty of \$7,000, and payable to appellants. This action is upon that bond.

Appellants seek to recover upon the ground that Kilburn violated his contract with them. Opp and Marks demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against them. The demurrer was sustained, and appellants declining to amend, judgment was rendered against them for costs. From that judgment they prosecute this appeal, and assign

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as error the sustaining of the demurrer. The only question for decision here, therefore, is, does the complaint make a case against Opp and Marks, the sureties on the bond? If it does not, the demurrer was properly sustained. If it does, the sustaining of the demurrer was error, and the judgment must be reversed. The contention of the appellees is, that it does not, because the contract between Kilburn and appellants is void for uncertainty, especially as to the sureties on the bond, in that the county in which the work was to be done by Kilburn is not given in the contract. Their position is, that it is manifest from the contract, that the intention was to limit the work to some particular county or counties, and that as no county is named, the contract is neither certain nor complete.

That sureties are favorites of the law, and will not be held beyond the terms of the engagement, is well settled. *Miller v. Stewart*, 9 Wheat. 680; *Burns v. Singer Manfg. Co.*, 87 Ind. 541, and cases there cited; *City of Lafayette v. James*, 92 Ind. 240 (47 Am. R. 140), and cases there cited. It is clear here, also, that the liability of the sureties upon the bond in suit, must be measured by the terms of the bond and the contract therein recited. While that contract is not, in the full sense, their contract, it is so connected with their contract that they are bound by it if valid, and are not liable if it is not valid. *Miller v. Stewart*, *supra*; *Burns v. Singer Manfg. Co.*, *supra*; *White Sewing Machine Co. v. Mullins*, 41 Mich. 339. The bond is to secure the faithful performance of that contract on the part of Kilburn, and to save appellants from loss by reason of its violation by him.

Appellees are presumed to have seen the contract, to have been acquainted with its terms, and to have contracted with reference thereto. And while they are not bound beyond its terms, the contract itself must be given a reasonable interpretation, in accordance with the settled canons of construction. The rule which requires that sureties shall not be bound beyond the terms of the engagement, does not require

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nor authorize a forced and unreasonable construction of the contract with a view of relieving the sureties. To the extent that the contract is valid and binding, as properly interpreted, it fixes and limits the liability of appellees under the bond. Whatever valid contract Kilburn made with appellants, he is bound to perform. For any neglect on his part to perform that contract according to its terms, and for any violation of its terms by him to the prejudice and loss of appellants, the obligors in the bond are bound to respond in damages. The imposition of such a liability is not a changing or enlargement of the liability of the sureties, but simply holding them to the terms of the engagement as properly and reasonably interpreted. It, therefore, becomes a material inquiry to ascertain whether or not the contract is a valid one, and, if so, the scope and effect of its terms.

It is manifest that Kilburn intended to enter into a valid contract with appellants. It is equally manifest that the obligors in the bond intended to indemnify appellants against loss by reason of Kilburn's neglect to perform that contract or his violation of its terms. It is, therefore, the duty of the courts to give to the contract such a reasonable construction as will give it effect, for, as said in the case of *Gano v. Aldridge*, 27 Ind. 294, it will not be intended that the parties meant it to be a nullity. See, also, *Huckleman v. Board, etc.*, 78 Ind. 162; Bishop Cont., section 582.

It is well settled, also, as a leading rule, that a written contract shall be so interpreted as, if possible, to carry out what the parties meant. Bishop Cont., section 575.

In arriving at this intention, not only must the words used be considered in their literal and ordinary signification, but the contract must be considered as a whole. Mr. Bishop, in his work on contracts, at section 579, lays down the following: "Every clause and even every word of a contract should, when possible, have assigned to it some meaning, and a harmonious whole be made to appear; for so the parties plainly intended, nor especially would they wilfully insert

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in their contract a mere idle provision." And, again, at section 580: "After efforts at interpretation have failed, what is still found repugnant to the rest may be rejected as surplusage." See, also, *Gano v. Aldridge*, *supra*; *Eldridge v. See Yup Co.*, 17 Cal. 44; *Cooley v. Warren*, 53 Mo. 166.

Tested by these rules, how stands the contract before us? It is stipulated therein, that Kilburn should "construct and furnish," according to the plans and specifications of the chief engineer of the Indianapolis, Decatur and Springfield Railway Company, "the following work on the line of said railway in the county of ———, State of Indiana." It is certain that the work was to be done on the line of the railway. It is also certain that the portion of the railway upon which the work was to be done is in the State of Indiana. The words and dash, "in the county of ———," standing alone, would seem to indicate an intention to limit the work to some one county. And, on the other hand, the fact that no county was named would seem to indicate an intention that none should be named, and that the work should not be confined to any particular county. Manifestly, therefore, the few words must not be considered alone, but must be taken in connection with all the rest of the contract.

While the amount of work to be done by Kilburn, as designated in the contract, might well have reference to some one county, and undoubtedly it would have, had a county been named, yet, in connection with the fact that no county was named, it indicates, in a small degree, that it was to be for the whole line of road in the State under contract by appellants. The terms are: "All the pile-driving and foundations, and all timber for trestles and foundations, and all timber we may need, and excavations for foundations."

There is a further provision of the contract which counsel seem to have overlooked in their briefs, and to which, doubtless, the attention of the learned judge below was not called, that we think is controlling. It is: "It is further agreed that the work embraced in this contract shall be prosecuted

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with such force, *and at such places*, as said second party may direct." That is, properly construed, *all* the pile-driving, etc., *all* timber for trestles, *all* the timber appellants might need, and excavations for foundations, being the work embraced in the contract, should be done at such places on the line of the railway in the State as appellants might direct.

The probability is that in drafting the contract a printed blank was used, and that, instead of marking out the words "county of," the blank was left unfilled as accomplishing the same thing. However that may be, and without entering the domain of conjecture, we think, that taking the contract as a whole, the undertaking by Kilburn was to do the work, and furnish the timber for the line of road in Indiana, at such places as appellants might direct, and that, therefore, the words "county of" may be rejected as surplusage.

It follows that the court below erred in sustaining the demurrer by appellant Marks, and that the judgment must be reversed, at their costs.

Judgment reversed, with costs.

Filed Nov. 24, 1885.

 No. 12,114.

HOLDERMAN ET AL. v. MANIER.

BAILMENT.—*Lien of Mill-Owner for Sawing Lumber.*—Where a mill-owner contracts to saw lumber for another at a stipulated price per thousand feet, his lien is not limited to any given lot of lumber for the price of sawing the same, but extends to the quantity in his possession for any general balance due him.

SAME.—*Action for Possession.*—*Partnership.*—*One Partner may Set up Lien Held by Firm.*—Where one partner only is made a defendant to an action for the possession of personal property, he may set up and rely upon a lien held by the firm in defence of his possession.

SAME.—*Surrender of Possession.*—The voluntary surrender of the possession of property, upon which a lien is held, operates as a waiver of the lien ;

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but mere permission by the lien-holder to an employee of the owner to pile up lumber in the former's mill-yard for its better preservation, is not a surrender of possession.

From the Noble Circuit Court.

T. R. Marshall, W. F. McNaghy and H. G. Zimmerman,
for appellants.

G. W. Best, for appellee.

NIBLACK, C. J.—This proceeding was commenced before a justice of the peace of Noble county, by John Holderman and Lewis Holderman against Daniel Manier, to recover the possession of a lot of lumber sawed from different kinds of timber, amounting in the aggregate to about eight thousand feet, and of the probable value of \$129.

In the circuit court, to which the cause came by appeal, the verdict and judgment were in favor of the defendant.

There was evidence tending to establish the following facts: That in the fall of 1882 the defendant and his son Jacob were residents of, and the owners of a saw-mill in, Noble county; that one Klinehance then resided at Larwill, in Whitley county, and was engaged in trading in lumber and timber; that during that fall Klinehance proposed to the defendant that if he would move his mill onto a point on his, defendant's farm, near the line of the Pittsburgh, Fort Wayne and Chicago Railroad, and not far from the Whitley county line, he, Klinehance, would furnish a large number of logs to be sawed into lumber at the mill, and would pay him, the defendant, at the rate of \$3.50 per thousand feet for all kinds of lumber which might be sawed out of the logs which should be thus furnished; that he, Klinehance, would in this way afford the defendant an opportunity to do sawing at his mill to the probable value of \$2,000; that the defendant, acting in his own, as well as his son's behalf, accepted Klinehance's proposition, and moved his mill and put it up at the point indicated; that Klinehance thereupon, from time to time, furnished to the defendant and his son logs to be sawed, and

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which were accordingly sawed into lumber, until he failed in business early in June, 1883; that the amount of sawing done in the meantime for Klinehance at the mill aggregated something, but not a large sum, over \$1,000; that the lumber in controversy was sawed out of logs furnished by Klinehance before his failure in business, and had been piled up together in the defendant's mill-yard by a man employed by Klinehance to do so; that, on the 5th day of June, 1883, Klinehance, finding himself unable to longer continue in business, sold and transferred the lumber in dispute, in connection with a large amount of other property, to the plaintiffs; that at that time Klinehance owed to the defendant and his son the sum of \$184.54, as a balance principally, if not entirely, due on account for sawing logs into lumber; that there was no specific agreement as to the time or the manner in which payments should be made by Klinehance to the defendant and his son, for the sawing which was to be done, but that in fact the parties to the agreement for the sawing had usually had settlements concerning the same once in the early part of each month; that a demand was made for the lumber in question by the plaintiffs before the commencement of this action, but the defendant refused to deliver it up until the balance due his firm from Klinehance was paid.

The evidence was conflicting as to some minor matters, but the general tendency of the evidence was to establish the facts relied on for a recovery in this case substantially as above stated.

It is first maintained that, under the contract between Klinehance and the defendant, the latter could only hold a lien upon any given lot of lumber for the price of sawing that particular lumber, and hence was not entitled to a lien upon any specific lot of lumber for any amount or balance due upon general account for sawing done at the mill.

A lien of the kind under discussion in this case is the right to hold possession of another's property for the satisfaction of some charge upon it. This right to a particular or

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specific lien on goods in the hands of a tradesman or artisan, for the price of work done upon them, is of common law origin, and has grown, naturally and necessarily, out of the transactions of persons with each other, as a matter of convenience as well as of public policy. This right has also been long since extended to every bailee who has by his labor and skill conferred some value on the thing bailed to him. In some cases the right to retain property on account of work performed, or expenses incurred, applies only to the identical property on which the work has been so performed, or on account of which the expenses have been so incurred. This rule applies to particular garments made by tailors out of cloth delivered to them for that purpose, and to other articles of property separate and distinct in their character to a similar extent. In other cases, this right to retain property until certain charges against it shall be paid, extends to a general balance due from the bailor to the bailee, such as factors, calico-printers, packers, fullers and other like bailees, to whom property is delivered, against the several parts of which it is impracticable to keep separate and distinct charges. *Wait Actions and Defences*, vol. 3, 301; vol. 4, 319, 320; vol. 7, 215, *et seq.*; *Hanna v. Phelps*, 7 Ind. 21; *Tucker v. Taylor*, 53 Ind. 93; *Mooney v. Musser*, 45 Ind. 115; *East v. Ferguson*, 59 Ind. 169; *Shaw v. Ferguson*, 78 Ind. 547; *Bunnell v. Davisson*, 85 Ind. 557.

By analogy, as well as from the very necessity of the case, the lien of Manier & Son on the lumber they sawed, under their contract with Klinehance, extended to any general balance which was or might have been due them at any time, and consequently fell within the latter class of liens, above referred to.

It is true, as contended by counsel, that generally the possession of property can not be defended upon the ground that some third person has a lien upon it, but in this case Daniel Manier's possession of the lumber was as a member of the firm of Manier & Son, and being made the only rep-

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representative of his firm by the prosecution of this suit against him alone, he had the right to set up and rely upon the alleged lien of the firm in defence of his possession.

It is also true, as further contended, that the voluntary surrender of the possession of property, upon which a lien is held, operates as a waiver of the lien; but we do not regard the permission extended by Manier & Son to an employee of Klinehance to pile up the lumber in suit in separate piles on their mill-yard, as a surrender of the possession of the lumber by them. The piling up of the lumber, under the circumstances which seemingly attended it, amounted to no more than a temporary handling and readjustment of it, with a view to its better preservation while it might remain in the mill-yard which was under the personal control, and hence in the possession, of Manier & Son.

So far as a proper decision of this case was involved, it was quite immaterial whether all the items, which went to make up the balance due from Klinehance to Manier & Son, were for sawing lumber, as the evidence established beyond all controversy that in any event much the larger part of such balance was for sawing done by Manier & Son under their contract with Klinehance, and as proof that any substantial amount was so due under such contract, was sufficient as a defence to this action.

If a tender to Manier & Son of an amount less than \$184.54, on the ground that the amount so tendered was all that was due for sawing, had been shown, a different question for the consideration of the jury might have been presented.

Objections are urged to some of the instructions given to the jury at the trial, but what we have already said practically disposes of all the questions raised by the instructions complained of, and renders unnecessary any special and particular notice of those instructions.

The judgment is affirmed, with costs.

Filed Dec. 8, 1885.

The State, *ex rel.* Miller, *v.* The Board of Commissioners of Pike Co. *et al.*

No. 12,316.

THE STATE, EX REL. MILLER, *v.* THE BOARD OF COMMISSIONERS OF PIKE COUNTY ET AL.

COUNTY COMMISSIONERS.—*Special Session.—Notice.—Defective Return.*—Where the members of a board of county commissioners meet in special session on the day and at the place named in a summons, issued by the auditor and placed in the hands of the sheriff to be served, such board is lawfully convened, although the sheriff's return, showing service, is not signed and does not give the date of such service.

SAME.—*Repeal of Act by Implication.*—The act of March 7th, 1863 (sections 5737 to 5739, R. S. 1881), "providing for calling special sessions of boards of county commissioners," repealed by implication the act of February 2d, 1855 (Acts 1855, p. 87), "authorizing county auditors to call a special term of the board of county commissioners," etc.

From the Daviess Circuit Court.

L. D. Thomas, J. H. Miller, E. R. Richardson and J. G. Williams, for appellant.

J. W. Wilson, F. B. Posey, E. A. Ely and W. F. Townsend, for appellees.

Howk, J.—This was a suit by the appellant's relator, Miller, against the appellees, the board of commissioners of Pike county, and William J. Bethel, auditor of such county. The object of the suit, as stated in the prayer of the relator's complaint, was to compel, by mandate, the board of commissioners of Pike county to make an additional levy upon the taxable property of Washington township, in such county, in favor of the Indianapolis and Evansville Railway, equal to one per centum upon the taxable value of the property of such township, as shown by the tax duplicate of the township, delivered to the treasurer of Pike county for the year 1878, and to correct the entry made in the order-book of such board, at its June session in 1879, by inserting the name Evansville, Washington and Worthington Railway Company, in lieu of the name Evansville, Worthington and Washington Railway Company, then appearing in such order, and to order the whole of such tax to be collected, or show

104	123
139	249
104	123
142	346
104	123
146	104
147	87
104	123
170	491

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cause why it should not; and to compel, by mandate, the appellee Bethel, as auditor of such county, to place upon the tax duplicate of Washington township the levy made by such board of commissioners at its June term, 1879, and the levy therein prayed to be made by such board, or show cause why he should not do so.

This suit was commenced in the Pike Circuit Court, but the venue thereof was subsequently changed to the court below. There the issues joined in the cause were tried by the court, and a finding was made for the appellees, the defendants below, and over the relator's motion for a new trial, judgment was rendered against him for appellees' costs.

In this court, the only error assigned by appellant's relator is the overruling of his motion for a new trial.

The only question presented and discussed by the relator's counsel, in their able and exhaustive brief of this cause, may be thus stated: Did the trial court err in refusing to permit the relator to prove, by parol evidence, that the auditor's call for a special session of the board of commissioners of Pike county was duly served upon each member of such board? or 2. Upon the evidence admitted, and appearing in the record, did the trial court err in finding for the appellees, the defendants below?

We will first consider and decide the second of these two questions. There is no conflict in the evidence appearing in the record. It was all introduced by appellant's relator; no evidence whatever was introduced by the appellees or either of them. The first question for decision, therefore, is whether or not the court below did not err in overruling the relator's motion for a new trial, because the finding of the court was not only not sustained by, but was contrary to, the evidence admitted and actually in the record. It was shown by the evidence of Frank Bilderback, that in January, 1879, he was the auditor of Pike county, and that, as such auditor, he issued a written call notifying the board of commissioners of Pike county to meet in special session. A paper writing

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having been shown the witness, Bilderback, he identified the same as the written call so issued by him. The written call and the endorsement thereon were then read in evidence, as follows:

"STATE OF INDIANA, PIKE COUNTY, ss:

"To the Sheriff of said County, Greeting:

"Whereas, in my opinion, the interest of Pike county demands that the board of commissioners of said county should meet in special session, you are therefore commanded to summon John J. Robling, Joseph Ferguson and George Fetting, who now constitute said board, to appear and attend a special session of the board of commissioners of said county, to be holden at the auditor's office in Petersburg, Indiana, on the 15th day of January, 1879, to meet at the hour of one o'clock P. M. of said day, and then and there return this writ. In witness whereof, I hereunto set my hand and affix my official seal, this 13th day of January, 1879.

"(Signed) FRANK BILDERBACK, A. P. C. [SEAL.]"

Endorsed: "Served, as commanded, by reading the within summons to, and within the hearing of, John J. Robling, Joseph Ferguson and George Fetting. Mileage \$6.20; service \$1.20; return .10; total \$7.50."

This endorsement is without date or signature.

Appellant's relator offered and read in evidence a transcript, duly certified, of the proceedings of the board of commissioners of Pike county, on the 15th day of January, 1879, the day named in the foregoing call of the auditor of such county. It was shown by this transcript, "that at a special term of the commissioners' court, begun and held at the auditor's office in the town of Petersburg, in Pike county and State of Indiana, on the 15th day of January, 1879, where were present the Hons. John J. Robling, Joseph Ferguson and George Fetting, commissioners of said county, and Frank Bilderback, auditor, the following proceedings were had, to wit:" And here follow the proceedings of the county board showing the presentation of a proper petition signed

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by more than twenty-five freeholders of Washington township, in Pike county, praying that an appropriation of \$18,570, being two per cent. upon the aggregate valuation of the taxable property of such township, as shown by the tax duplicate of Pike county for the year 1878, should be donated by Washington township to the Evansville, Washington and Worthington Railway Company, to aid in the construction of its railway through such township, and that the question of making such donation might be submitted to the legal voters of Washington township at an election to be held for that purpose; and that the county board then and there caused such petition to be entered upon its record, and after finding that the petition was signed by more than twenty-five freeholders of Washington township and was conformable to law, and that the prayer thereof ought to be granted, then and there ordered an election to be held in such township on the 17th day of February, 1879, for the purpose of taking the votes of the legal voters of the township upon the question of making the donation to the above named railway company, as prayed for in such petition.

It was further shown by competent evidence, that notices of such election were duly published and posted by the auditor and sheriff of Pike county, and their respective certificates in regard to such notices were entered upon the record of the county board; that such election was duly held, under the order of the county board and pursuant to such notices, and returns thereof were made by the proper election officers and board of canvassers, and were entered upon the record of the county board; and that these returns showed that two hundred and ninety-six votes were cast at such election in favor of making such donation, and that not one vote was cast against it. The evidence further showed that at its regular June session, 1879, the board of commissioners of Pike county entered of record the following order, to wit:

“In the matter of the application to aid in the construc-

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tion of the Evansville, Worthington and Washington Railway Company :

"Whereas, at the January, 1879, special session of the board, held on the 15th day of January, 1879, it was ordered that an election should be held in Washington township, in this county, on the 17th day of February, 1879, at which election the voters of said township should determine by ballot whether or not said township should make a donation to aid said railroad company in the construction of their railroad through said township, to the amount of two (2) per cent. of the taxable value of the property of said township for the year 1878; and whereas it appears by the returns of said election it was duly held on the day aforesaid, that a majority of the votes cast at said election were for the railroad appropriation, and it further appearing that the sum of two (2) per cent. of the taxable value of property of said township for the year 1878 would produce the sum of \$18,-770: It is therefore ordered that a levy of two (2) per cent. of the taxable value of the property of said township as shown by the tax duplicate for 1878 be, and the same is hereby made, and that the auditor shall place upon the tax duplicate of said township for collection during the ensuing year one (1) per cent. of this levy, and the remaining one (1) per cent. shall be placed upon the tax duplicate at the June session of this board in 1880, and that the same be collected as provided in an act entitled, An act to authorize and to aid in the construction of a railroad by counties and townships taking stock in or making donations to the railway companies, approved May 12th, 1869, and all other acts supplementary thereto.

"It is further ordered that upon the collection of said sum to be produced by said levy, the same or any part thereof shall on demand be paid over to said railway company when they have complied with the provisions of said act referred to relative to the construction of their said road, and the

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terms and conditions set forth in the matter, and all the orders made by this board since the filing of said petition."

It was further shown by competent evidence that the auditor of Pike county placed the one per cent. tax, levied by the county board at its June session, 1879, upon the tax duplicate of that year for Washington township, and that such tax was paid by some of the taxpayers; that the unpaid portion of that levy was omitted by the auditor from the tax duplicates of succeeding years; that the county board failed at its June session, 1880, and had since failed and refused, to levy the additional one per cent. of the tax voted for; and that the railway of the railway company, in aid of which such tax was voted, was completed, and trains of cars were running thereon, through Washington township prior to December 1st, 1883, and prior to the commencement of this action.

Upon the evidence in the record, which we have briefly summarized, we are of opinion that the finding of the trial court ought to have been in favor of the appellant's relator. We learn from the briefs of counsel that the learned court which tried the cause below held that the evidence failed to show that the board of commissioners of Pike county was lawfully convened in special session on the 15th day of January, 1879, when the petition of the freeholders of Washington township was presented to and considered by such board. This view of the evidence, as it seems to us, is erroneous and can not be sustained. The evidence conclusively shows, (1) that the auditor of Pike county issued a summons for the members of the county board to meet in special session on the 15th day of January, 1879, and placed the same in the hands of the county sheriff to be served, and (2) that the members of such board did meet in special session on the day and at the place named in such summons. It is true that the return of this summons is imperfect and incomplete in this, that it does not give the date of service and lacks the signature of the sheriff. But, with the presumptions that must be indulged, in the absence of any showing to the contrary, that

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public officers discharge their official duties according to law, it must be held, we think, that the sheriff duly served such summons on each of the members of the county board, and that the special session of such board, on the day and at the place named in such summons, was duly and lawfully held under and pursuant to the notice thereby given.

Special sessions of the board of county commissioners are provided for, and the county auditor is expressly authorized to call such sessions, in sections 5737, 5738 and 5739, R. S. 1881, in force since October 10th, 1863. In *Wilson v. Board, etc.*, 68 Ind. 507, after a careful consideration of these sections of the statute, the court said: "Whatever notice the auditor, or other acting county officer, may give of such special session, and however and whenever such notice may be served, it seems to us that these matters become and are unimportant and immaterial, if, pursuant to such notice so served, the board of commissioners actually meet at the time indicated therein, in special session." And to the same effect, substantially, are the following cases: *Oliver v. Keightley*, 24 Ind. 514; *Board, etc., v. Brown*, 28 Ind. 161; *Jussen v. Board, etc.*, 95 Ind. 567.

In the case last cited, it appeared that the members of the county board were served with written notices of the special session by the auditor in person, and not "by summons issued to and served by the sheriff;" and it was held, and correctly so we think, that the board of county commissioners was lawfully convened in special session, under and pursuant to the notice so served.

The sections of the Revised Statutes of 1881, above cited, are the only sections of an act entitled "An act providing for calling special sessions of boards of county commissioners," approved March 7th, 1863. Although this act contained no repealing clause or section, yet, as its provisions cover the whole subject-matter of the act of February 2d, 1855, "authorizing county auditors to call a special term of the board

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of county commissioners," etc. (Acts 1855, p. 87), and were inconsistent therewith, and were evidently intended to supersede it and take its place, the older law is repealed by implication by the later statute. *Leard v. Leard*, 30 Ind. 171; *Longlois v. Longlois*, 48 Ind. 60; *Wagoner v. State*, 90 Ind. 504.

Our conclusion is that the finding of the court below was not sustained by sufficient evidence, and was contrary to law, and that, for these causes, the relator's motion for a new trial ought to have been sustained. This conclusion renders it unnecessary for us to consider or decide whether or not the court erred in the exclusion of offered evidence.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Dec. 8, 1885.

No. 11,923.

THE WESTERN UNION TELEGRAPH COMPANY v. MCGUIRE.

TELEGRAPH COMPANY.—*Rule Requiring Transient Person Sending Messages to Deposit Money for Answer.*—A rule of a telegraph company, that transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words, is reasonable and valid, and the company may, without liability, refuse to transmit a message until the deposit to pay for the answer is so made.

From the Clinton Circuit Court.

J. R. Coffroth, T. A. Stuart, B. K. Higinbotham, J. A. Stein and M. Bristow, for appellant.

A. E. Paige, S. O. Bayless and W. H. Russell, for appellee.

ELLIOTT, J.—The complaint seeks a recovery of the stat-

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utory penalty for a failure to transmit a telegraphic message. The answer of the appellant is substantially as follows: "The defendant says that it did fail and refuse to transmit the message set forth in the complaint, but defendant says that the plaintiff was a stranger in Frankfort and a transient person therein; that the said message was one that required an answer; that the defendant has, and had at the time, as one of its general rules and regulations of business, regularly adopted for the government of the operators and agents of said company, the following rule: 'Transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words. In such case the signal, "33" will be sent with the message, signifying that the answer is prepaid;' that the defendant's agent to whom said message was offered, informed the plaintiff of the existence of said rule and what said rule was, and that the amount required to be deposited was twenty-five cents; that thereupon the plaintiff refused to comply with said rule and make said deposit."

To this answer a demurrer was sustained, and on this ruling arises the controlling question in the case.

One of the incidental and inherent powers of all corporations is the right to make by-laws for the regulation of their business. There is no conceivable reason why telegraph corporations should not possess this general power; nor is there any doubt under the authorities that this power resides in them. *Western Union Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 715), *vide* opinion, p. 231, and authorities cited; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429 (9 Am. R. 744); *True v. International Tel. Co.*, 60 Maine, 9 (11 Am. R. 156); *Scott & J. Law of Telegraphs*, section 104.

Affirming, as principle and authority require us to do, that the telegraph company had power to make by-laws, the remaining question is whether the one under immediate mention is a reasonable one. It is established by the authorities that an unreasonable by-law is void. *Western Union Tel. Co. v. Jones*, *supra*; *Western Union Tel. Co. v. Buchanan*, *supra*;

The Western Union Telegraph Company v. McGuire.

Western Union Tel. Co. v. Adams, 87 Ind. 598 (44 Am. R. 776); *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299 (45 Am. R. 480, see authorities note, pages 491, 492).

It is for the courts to determine whether a by-law is or is not an unreasonable one, and this is the question which now faces us. 1 Dillon Munic. Corp. (3d ed.), section 327; Scott & J. Law of Telegraphs, section 104.

We are unable to perceive anything unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services. It is not unnatural, unreasonable or oppressive for the telegraph company to take fair measures to secure payment for services rendered, and in requiring a transient person to deposit the amount legally chargeable for an ordinary message, it does no more than take reasonable measures for securing compensation for transmitting the asked and expected message.

We have found no case exactly in point, but we have found many analogous cases which, in principle, sustain the by-law before us. *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Camp v. Western Union Tel. Co.*, 1 Met. Ky. 164; *Vedder v. Fellows*, 20 N. Y. 126; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *McAndrew v. Electric Tel. Co.*, 33 Eng. L. & Eq. 180; *Western Union Tel. Co. v. Blanchard*, *supra*, see authorities cited note, 45 Am. R., page 489; *Western Union Tel. Co. v. Jones*, *supra*.

Judgment reversed, with instructions to overrule the demurrer to the answer and to proceed in accordance with this opinion.

Filed Sept. 15, 1885; petition for a rehearing overruled Dec. 9, 1885.

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No. 12,177.

THE SUPREME COUNCIL OF THE ORDER OF CHOSEN
FRIENDS v. GARRIGUS.

104	133
126	56
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131	423
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e165	320

INSURANCE.—Mutual Benefit Society.—Member May Resort to Court of Law to Enforce Rights.—A member of the Order of Chosen Friends is not bound, as the holder of a relief fund certificate, to exhaust his remedies in the courts of the order before resorting to a court of law, nor is he concluded by an adverse decision on his claim by the Supreme Council, from resorting to a court of law; and the order can not, by provisions in its constitution, by-laws or relief fund laws, deprive him of this right. *Bauer v. Samson Lodge, K. of P.*, 102 Ind. 262, followed.

SAME.—“Accident.”—Injury Received in Affray.—Under a provision in the laws of the Order of Chosen Friends providing for payment to certificate holders who have become disabled by accident, the word “accident” will be given its ordinary and usual signification, as being an event that takes place without one’s foresight or expectation, and it may include an injury received by one in a common law affray, where no fault on his part is shown.

COMMON LAW.—Presumption that it is in Force in Other States.—In the absence of any showing to the contrary, the courts of this State will presume that the common law is in force in another State.

AFFRAY.—Common Law Definition.—The common law definition of an affray does not involve an agreement to fight, as does the statute of this State, and one might become engaged in such affray without culpable fault.

From the Marion Superior Court.

F. M. Finch and *J. A. Finch*, for appellant.

S. M. Shepard, *C. Martindale* and *L. C. Garrigus*, for appellee.

ZOLLARS, J.—Appellee brought this action to recover from appellant \$1,500, which he claims is due him under the charter, constitution and by-laws of the order. The order was incorporated under section 3502, R. S. 1881. Some of its principal objects, as declared in the articles of incorporation, are to unite its members in bonds of fraternity, aid and protection, to improve the condition of the members morally, socially and materially, and to establish a relief fund, from which members, who have complied with all its rules and reg-

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ulations, or persons by such members lawfully designated, or the legal heirs of such members, may receive a benefit in a sum not exceeding three thousand dollars, which shall be paid either when a member reaches the age of seventy-five years, or when, by reason of disease or accident, such member becomes permanently disabled from following his usual, or some other occupation, or upon satisfactory evidence of the death of such member, and when all the conditions regulating such payment have been complied with.

Among the general officers designated in the articles are a supreme councillor, a supreme recorder, a supreme treasurer, and a supreme medical examiner.

Among the powers named in the articles, it is declared that the association shall have power to make and change its own constitution and laws, and to grant, revoke and change constitutions for all grand and subordinate councils of the order, and to finally decide all matters and appeals pertaining to the order, which shall be properly presented to it.

The constitution adopted by the order provides for the same general officers, declares the same objects, and asserts the same powers. It is there declared that the order shall have power to grant charters for grand councils, in any State, Territory or country, not under the jurisdiction of a grand council; that it shall have exclusive power to grant charters to subordinate councils, which shall be, until the formation of a grand council, under the immediate and direct jurisdiction of the order—the Supreme Council of the Order of Chosen Friends.

There is another provision that the decisions of the supreme council on all matters pertaining to the order, and on all appeals properly presented, shall be final. The duties of the supreme medical examiner are defined as follows: "The supreme medical examiner shall carefully examine all reports and papers relating to the permanent disability of a member of the order, and render a decision thereon. He shall examine and report on all medical examinations referred to him,

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and perform such other duties as the laws and usages of the order require. He shall submit at each annual session of the supreme council a written report of all his official acts during the recess." It is further provided that grand councils shall have no control of the relief fund.

Among the committees provided for by the by-laws of the order is a committee on grievances. The duties and powers of this committee, as fixed by the by-laws, are as follows: "The committee on grievances and appeals shall examine all cases of grievances coming before the supreme council by appeal or otherwise, and report their opinion, together with a distinct statement of all questions at issue, to the supreme council."

The relief fund laws adopted by the order provide for the creation of a relief fund. One section of these laws provides that upon permanent disability one-half of the amount named in the relief fund certificate held by the member shall be paid to him at once.

Another section is as follows: "Should a member become permanently disabled from following his or her usual or other occupation, by reason of disease or accident, on receipt of the proper notice the supreme council shall order a board of three physicians (who shall be members of the order if possible) to be selected by the subordinate council, whose duty it shall be to make a careful examination of the member's condition, report as to the permanency of the disability, and upon their recommendation, and the approval of the supreme medical examiner, the member shall be entitled to one-half the benefit: *Provided*, That where the disability is caused by accident, and is patent to the eyes of all, the examination by the board of physicians may be dispensed with," etc.

Another section provides that upon the receipt of the proper notice of the permanent disability of a member, the supreme recorder shall draw an order on the supreme treasurer in favor of such member for the amount, and forward the same

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to the treasurer of the subordinate council of which the disabled person is a member.

Another section provides that the treasurer of the subordinate council shall deliver the order to the member, and receive from him his relief fund certificate.

Basing his claim upon these provisions of the articles of incorporation, the constitution, by-laws and relief fund laws, appellee charges in his complaint that the supreme council instituted and established a subordinate council in the State of Kentucky, known as Logan Council No. 12, of which he was and is a member, holding a relief fund certificate for \$3,000; that in May, 1883, without any agency, fault or negligence on his part, he received a pistol-shot wound in the elbow, which permanently disabled him from following his usual or other occupation, and that his disability was and is patent to the eyes of all. He, however, through the Logan council, notified the supreme council, and it in turn notified the Logan council to appoint a board of physicians to examine the injury. The board was appointed and reported in favor of allowing and paying to appellee \$1,500, the one-half of the amount named in his relief fund certificate. Appellant has refused and still refuses to pay the amount.

Appellant answered this complaint in four paragraphs, the first of which is a general denial. The second is based upon the theory that as there was no grand council in the State of Kentucky, Logan council No. 12 was under the immediate jurisdiction of the supreme council; that the provisions of the articles of incorporation, the constitution, by-laws and relief fund laws of the supreme council, above referred to and set out, were intended to and do afford the members of the order an adequate tribunal within the order for the settlement of such controversies. It alleges that the report of the board of physicians was referred to the supreme medical examiner, who decided against allowing appellee's claim; that he might have appealed from this adverse decision to the supreme council, but did not do so, and that, therefore, he

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can not prosecute this action. In short, the theory of the plea is, that he did not first exhaust the remedies provided within the order, and can not, therefore, have recourse to a court of law.

The third paragraph of the answer charges that appellee should not recover in this action for the reason, among others, that he "became engaged in an affray with a party or parties whose names are unknown to the defendant, during which he, the plaintiff, received a pistol shot wound in the right arm, said wound being inflicted wilfully and intentionally by said third party or parties," and that the same was, therefore, not accidental. It is further charged that appellee was not thereby permanently disabled from following his usual occupation. There are many other averments in this paragraph, but the above are the real questions presented thereby.

The fourth paragraph is based upon the theory that under the provisions of the articles of incorporation, etc., above referred to and set out, the supreme council is made the arbiter and court of appeals for the final settlement of all controversies between the order and its members. It is alleged that appellee called for the appointment of a board of physicians; that they were appointed and reported in favor of his claim; that this report was referred to the supreme medical examiner; that the supreme medical examiner decided against the claim, and reported his decision to the supreme council, and that upon the receipt of such report the supreme council refused to allow appellee's claim.

The second and fourth answers present these questions:

First. Do the constitution, by-laws and relief fund laws provide a tribunal within the order to which a member may appeal in a case like this?

Second. If there is such a tribunal and a mode of appeal thereto provided, must a member, in a case like this, take such appeal, and exhaust his remedies in such courts of the order before resorting to a court of law to enforce his rights?

Third. If the supreme council, as such appellate court,

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passes upon such a claim adversely, is the decision so final and conclusive that the member may not resort to a court of law?

All of these questions were exhaustively examined and ruled in the negative in the case of *Bauer v. Samson Lodge, K. of P.*, 102 Ind. 262.

The by-laws and regulations involved in that case more clearly define the tribunals within the order, and the mode of appeal thereto, than do the by-laws, etc., involved in the case before us. Here, when a matter has been referred to the board of physicians, and they have passed upon it, their report goes to the supreme medical examiner for his examination and decision. He is to report his official acts to the supreme council. So far as we can discover there is no mode provided in the by-laws or otherwise, by which a member, in a case like this, can appeal from the decision of the supreme medical examiner, or invoke the decision of the supreme council in approval or disapproval of the decision of that officer. However that may be, it is very clear that the provisions are not such as to make it obligatory upon the member, in a case like this, to first invoke a decision of the supreme council before resorting to a court of law to enforce his rights. It is also clear, under the ruling of the above case of *Bauer v. Samson Lodge, K. of P.*, *supra*, that the order could not, by provisions in its constitution, by-laws or relief fund laws, deprive a member of the right to resort to a court of law to enforce his rights. The reasons upon which the rulings in that case are made to rest are so fully stated, with a citation of the authorities, that we need not re-state them here. We, therefore, content ourselves with a citation of the case.

As we have seen, the relief fund laws provide for the payment to the member of one-half of the amount named in the relief fund certificate held by him, when he has become disabled by accident. It is charged in the complaint, as we have also seen, that without any agency, fault or negligence

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on the part of appellee, he received a pistol-shot wound in the elbow which permanently disabled him from following his usual or other occupation.

The third answer is an attempt to meet and overthrow the case as made by the complaint, by alleging that appellee became engaged in an affray, and that the pistol-shot wound was intentionally inflicted by the adversary or adversaries. The argument is, that the injury, having been intentionally inflicted in an affray, was not an accident, and that hence appellee can not recover.

Our statute provides that if two or more persons, by agreement, fight in any public place, the persons so offending are guilty of an affray. R. S. 1881, section 1980. To be engaged in an affray under this statute, both parties will be guilty of a violation of the law, because the fighting must be by agreement. We have no knowledge, however, that such a statute is in force in Kentucky, where appellee received the wound, and where it is alleged in the answer he received it. We can not, therefore, give to the word "affray," as used in the general charge in the answer, a meaning broader than the usual and ordinary signification of the word. Ordinarily, an affray means simply the fighting of two or more persons in some public place, to the terror of others. Mr. Roscoe, in his work on Criminal Evidence, at page 270, says: "It differs from a riot, in not being premeditated. Thus if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention." It will thus be seen that the common law definition of an affray does not involve an agreement to fight, as does our statute. We must presume that the common law is in force in Kentucky. It might be, therefore, that appellee was engaged in an affray in

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Kentucky without having agreed to fight, and without any culpable fault on his part.

The charge that appellee was engaged in an affray is more-over the statement of a conclusion, and is not sufficient to meet the averments in the complaint, that appellee received the wound without any agency, fault or negligence on his part. If the facts were stated instead of the conclusion, as the rules of pleading require, it might appear that the only part appellee took was in defence of his person against the assaults of his adversary or adversaries, and that thus, whatever injuries he received were received without any fault or wrong on his part. Nor will it do to say, that because the injury was intentionally inflicted by the assailant and wrong-doer, it was not an accident to appellee, within the meaning of the word "accident," as used in the relief fund laws, etc., of the order. To thus limit the word "accident," would be to thwart the manifest object of the order and deprive the members of the benefits they have a right to expect upon the payment of their dues and assessments. The word "accident," as used in those laws and in the relief fund certificates held by the members, should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation. It will not do to say, that because a desperado waylays, assails and wounds a member intentionally, that wounding is not an accident to the member, within the laws, etc., of the order.

It follows from what we have said, that the court below, at general term, did not err in reversing the decision at special term, and in remanding the cause to the special term, with directions to sustain appellee's demurrer to the second, third and fourth paragraphs of appellant's answer.

The judgment at general term is affirmed, at appellant's costs.

Filed Dec. 8, 1885.

Cook et al. v. Churchman et al.

No. 12,238.

COOK ET AL. v. CHURCHMAN ET AL.

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STATUTE OF FRAUDS.—*Parol Representations as to Credit of Another.*—Parol representations concerning the character, conduct, credit, ability, trade or dealings of any other person, by one not a party to the transaction, with the intent that such other person shall obtain credit thereby, are within section 6 of the statute of frauds, the same being section 4909, R. S. 1881.

SAME.—*Conspiracy.*—Such representations, made by one so situate for the purpose of enabling another to obtain credit, are equally within the statute, whether made as the result of a conspiracy or not.

SAME.—*Fraudulent Representations Advantageous to Maker.*—Such representations are none the less within the statute for having been fraudulently made, with an expectation that some incidental advantage might flow to the person making them from the credit induced thereby.

SAME.—*Representations as to Particular Property and Assets of Another.*—Parol representations concerning the particular property and assets of another, made with a view to establish the general credit and pecuniary ability of the other, are also within the statute.

From the Marion Superior Court.

L. B. Swift, C. Byfield and L. Howland, for appellants.

F. Winter, F. Rand, J. M. Winters, W. D. Bynum and A. T. Beck, for appellees.

MITCHELL, J.—This suit was brought to recover damages for alleged false and fraudulent representations as to the solvency, credit and ability of Thomas Cottrell, by means of which it is charged the plaintiffs were induced to sell and deliver to his son, Thomas G. Cottrell, above nine thousand dollars worth of goods on credit, in reliance upon the written guaranty of Thomas Cottrell.

The amended complaint is in four paragraphs. The first paragraph states that the plaintiffs were in business in the city of New York; that Thomas G. Cottrell, since deceased, was in business in the city of Indianapolis; that the defendant Francis M. Churchman, for more than fifteen years, had been a banker in the city of Indianapolis, as a member of the banking firm of S. A. Fletcher & Co.; that Thomas G. Cottrell

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was heavily indebted to S. A. Fletcher & Co.; that he and the defendants Thomas Cottrell and Francis M. Churchman, knowing that the plaintiffs were ignorant of this indebtedness and of the financial ability of Thomas Cottrell, conspired together to fraudulently represent Thomas Cottrell as of good credit and financial standing, and to get the plaintiffs to sell goods to Thomas G. Cottrell upon credit, taking Thomas Cottrell as a guarantor for the payment of the same, with the fraudulent intention of not paying for the goods, but of turning them, or the proceeds thereof, over to S. A. Fletcher & Co.

Pursuant to this conspiracy, Thomas Cottrell, with the consent of his co-conspirators, offered himself to plaintiffs as guarantor of the payment for goods that plaintiffs might sell to Thomas G. Cottrell, and referred plaintiffs to Churchman as a man who would vouch for his credit and solvency; that plaintiffs thereupon applied to Churchman, and he, in pursuance of the conspiracy, falsely and fraudulently, and with intent to cheat plaintiffs out of their goods, represented to plaintiffs that Thomas Cottrell was solvent and of good credit, was the owner of a valuable property, and was amply good above all his indebtedness for the price of the goods; and he fraudulently concealed from plaintiffs that Thomas Cottrell was then heavily indebted to S. A. Fletcher & Co.

The second paragraph differs from the first in charging that the representations concerning the standing of Thomas Cottrell were made by himself, with the knowledge and connivance of Churchman.

The third paragraph differs from the others in charging that Thomas Cottrell, being the father of Thomas G. Cottrell, asked the plaintiffs to sell his son goods on credit, on the father's written guaranty, and to induce plaintiffs to make this arrangement, Thomas Cottrell told them that he was wealthy; that he was the executor of a large estate, the heirs of which wanted money, and he had let them have his notes, which they had endorsed and negotiated; that the notes had been

sued to judgment against him ; that these judgments had been paid with his money, and then, instead of being cancelled, had been assigned to S. A. Fletcher & Co. ; that instead of being claims against him, as they appeared, these judgments were in reality not liens upon his property, but were large secured claims of his against said estate ; that the only valid judgments against him unprovided for amounted to \$7,500 ; that he was the owner of a large property and had abundant means ; that he owned a number of pieces of valuable real estate ; that he pointed out to plaintiffs valuable pieces of real estate so claimed by him, among the rest a piece on Virginia avenue, and the piece known as the City Hall, in Indianapolis.

Then remarking that defendant Churchman was familiar with all his affairs, he took plaintiffs into the bank of S. A. Fletcher & Co., and, introducing them to Churchman, explained to the latter the guaranty arrangement, and asked him to explain to plaintiffs his (Cottrell's) affairs, and plaintiffs then repeated to Churchman all that Thomas Cottrell had said and done, and asked Churchman whether Cottrell's representations were true, and whether they could safely rely upon his guaranty, and sell his son goods on credit to the extent of \$8,000 or \$10,000. Churchman answered that the representations were substantially true ; that Cottrell was a very honorable and fair-minded man ; that under his guaranty plaintiffs would be perfectly safe in selling goods to his son. The complaint further charges that these representations were false, were known to be so by defendants, and were made by them with intent to cheat plaintiffs ; that Thomas Cottrell was wholly insolvent, which both defendants knew and concealed from plaintiffs with fraudulent intent ; that his insolvency has continued ever since.

The fourth paragraph alleges the proposal of the father to the plaintiffs to take him as guarantor and sell his son goods on credit ; the same representations of the father as to his financial condition, the same story about his claims against

an estate, the same representations as to the condition of his property, and the same pointing out of certain pieces; also the same introduction to defendant Churchman, and the same corroboration by him; also the falsity of the representations, the insolvency of Thomas Cottrell, the heavy indebtedness to S. A. Fletcher & Co., the ignorance of plaintiffs, and the knowledge and fraudulent concealment of defendants. This paragraph further says that the plaintiffs, relying on the truth of these representations, entered into the proposed arrangement of guaranty, and under it let Thomas G. Cottrell have goods of the value of \$9,202.83, which they lost by reason of the false and fraudulent representations, although they have diligently endeavored to collect payment by judgment and execution against both Cottrells.

In all of the foregoing paragraphs it is averred that Thomas G. Cottrell was heavily indebted to Fletcher & Co., and that they secured a priority over his other creditors by levying executions, and otherwise, on some of the goods obtained from the plaintiffs in the manner alleged.

The defendants separately demurred to each paragraph of the amended complaint. The court, in special term, sustained the demurrers, and the plaintiffs refusing to plead further, judgment was rendered in favor of the defendants for costs. The death of plaintiff John M. Bruce was shown to the court, and the surviving partners, John C. Cook and Russell W. McKee, appealed to the general term, where the judgment of the court in special term was affirmed, and an appeal was taken to this court. The error assigned is that the court in general term erred in affirming the judgment of the court in special term.

It is conceded that all the representations were by parol, and the question argued on both sides, so far as it concerns the defendant Churchman, is, whether the action can be maintained notwithstanding the provisions of section 4909, R. S. 1881, sec. 6 of the statute of frauds. That section provides that "No action shall be maintained, to charge any person by

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reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him legally authorized."

The appellants' argument for a reversal of the judgment below rests primarily on the principle, which has been asserted so often as almost to have become a maxim, that the statute of frauds shall not be used as a cover for fraud. Their contention is more particularly directed to the maintenance of the propositions, that the statute does not embrace in its protection representations which are tinged with fraud, and which were made with the actual intent to defraud, nor such as relate specifically to the amount or value of property or the actual pecuniary condition of the person concerning whom they are made. Cases in great number and in infinite variety may be found, and many of them are cited in the brief of counsel, in which, relying on a parol contract, one party, by the part performance of such contract, had so changed his situation that to permit the statute to be interposed to defeat a corresponding right dependent upon the contract, would have resulted in the consummation of a gross fraud. In all such cases the salutary principle is maintained that the statute of frauds was intended to prevent fraud, and not to be used as a cover under which to perpetrate it.

It is also well settled that where a contract is consummated, under which money or property is obtained, whatever fraudulent representations may have been employed by a party to the contract as a means of inducing it to be made, evidence of such representations can not be excluded by invoking the aid of the statute.

Cases which rest on the doctrine of part performance, and in which contracts otherwise within the statute have been taken out of its operation, can exert no controlling influence on the case we are considering. Part performance, as ap-

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plicable to parties to an invalid contract, is not relevant here. Nor must the distinction be overlooked between those cases in which representations were made by a party to the contract, with a view to induce another to enter into it, and those in which the representations were made by a third person, albeit for a corrupt and dishonest purpose, with the intent that a party to a contract should obtain goods or credit thereby.

Speaking of a statute substantially like that set out above, it was said in *Huntington v. Wellington*, 12 Mich. 10: "The representations and assurances here spoken of, are not representations or assurances made by a party to a contract, but by a third person, knowing them to be false, and making them for corrupt and dishonest purposes, to the injury of another. If one seeks information of another, with a view to some future action, and makes such information the basis of his action, and thereby sustains a loss, the statute will not permit him to allege the deception practiced on him by his informant, unless the information he acted on was in writing." It may, therefore, be considered that when representations are made concerning the credit, ability, etc., of another, by one not a party to the transaction, but with the intent that the person concerning whom they are made shall obtain credit upon such representations, then, even though fraudulent, they are nevertheless within the statute.

The complexion to which the averments against the defendant Churchman come is, that in a proposed transaction between the plaintiffs and the Cottrells, he made representations which tended to establish the credit and ability of Thomas Cottrell, with the intent that he should obtain credit therefrom, and be accepted as guarantor for Thomas G. Cottrell.

That the complaint contains averments charging a conspiracy can not affect the question. The purpose of the statute can not be disappointed by the form of the complaint. The necessity that the representations should have been made in

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writing is the same where conspiracy is set up as where it is not. Where the action is to recover damages for false representations, made by a stranger to the contract, concerning any of the subjects enumerated in the statute, it must fail, unless the representations were made in writing, duly signed, etc. This must be so whether the representations were made as the result of a conspiracy, and with the intent to perpetrate a fraud, or otherwise. The question of liability must be determined by the inquiry, were the representations made concerning the character, conduct, ability, etc., of "any other person," with the intent that the person concerning whom they were made, should obtain goods on credit thereby? If they were, then, without regard to the fact that they may have been made by a preconcerted arrangement, or that the credit resulting from the fact that they were made inured incidentally to the advantage of the person making them, they are within the protection of the statute.

The true test, whether the cause of action, in whatever form alleged, comes within the statute, is, whether the action can be maintained without proof of the representations, and whether the representations relate to some one or more of the subjects enumerated in the statute, and were made with the purpose to establish the credit or pecuniary ability of another. If such proof is essential, and if when made it establishes representations which relate to the subjects enumerated, then the statute applies. It is immaterial that the person making the representations may have had some design of obtaining an incidental advantage to himself as a result of the credit intended to be secured thereby. "In such case the protection extended by the statute is absolute and complete." *Hunter v. Randall*, 62 Maine, 423 (16 Am. R. 490). *Haslock v. Ferguson*, 7 Ad. & E. 86.

The statute we are now considering is in all respects the equivalent of what is commonly known as Lord Tenterden's act. This act was introduced to supply a defect, found to exist in the statute of frauds, which was rendered

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conspicuous by the decision in *Pasley v. Freeman*, 3 T. R. 51. Notwithstanding the provision that no action should be maintained whereby to charge another upon any special promise to answer for the debt, default or miscarriage of another, unless the agreement was in writing, signed, etc., the decision referred to pointed out a mode of evading the statute, by shaping the action so as to make it count upon a tort or wrong by some false or fraudulent representation to the defendant, in order to induce him to contract with another, instead of upon a special promise. The intent and purpose of the statute was to cut off all such actions and to place representations of the character therein referred to upon the same basis as special promises to answer for the debt of another. It would hardly be contended that if the action was to recover on an oral promise to answer for the debt, default or miscarriage of another, the case could be taken out of the operation of the statute by averring a conspiracy, or that the promise was made by preconcert or prearrangement between two or more. Nor could the operation of the statute be avoided by averring that the special promise was fraudulently made, or that the promisor had some ulterior design looking to his own advantage in making it. That the promise was oral, and that it was to answer for the debt, default or miscarriage of another, would be sufficient to end the inquiry. So, in this case, when it is admitted that the representations were by parol, that they related to the credit and ability of a third person, and were made with the intent that money, goods or credit should be obtained by such third person, the case falls within the statute, and the motive with which they were made beyond that of obtaining credit is immaterial.

If a case should arise in which it appeared that two or more persons entered into a conspiracy, the common purpose of which was to defraud another of his money or goods, or that some were engaged to assist others in accomplishing a fraudulent or illegal act, then whatever shams or tricks may appear to

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have been resorted to, the court will deal with the case as the facts may require. *Breedlove v. Bundy*, 96 Ind. 319.

We have, however, no such case here. The gist of the action is to recover damages by reason of false and fraudulent representations, and the fact that conspiracy is alleged does not change the nature of the action or dispense with the kind of proof required by the statute. Conspiracy is not the ground of the action, nor does the cause of action arise from conspiracy, but from the representation and the damage following it. *Bowen v. Matheson*, 14 Allen, 499; *Parker v. Huntington*, 2 Gray, 124.

All that can be said of the representations, in the aspect in which we are now considering them, is that they make a case in which Churchman, a third person, was applied to by persons who were about to, and did contract with the Cottrells, for information concerning the credit and ability of one of them to pay for goods which they had it in contemplation to sell the other. That it was agreed beforehand that the plaintiffs should be referred to him, and that he should make the representations which he did make, or that the relations of the Cottrells to the firm of Fletcher & Co. were such that the credit extended subsequently resulted to the advantage of Fletcher & Co., in enabling them to secure their debt, can not destroy the effect of the statute. *Mann v. Blanchard*, 2 Allen, 386.

Upon this subject a court of high authority said: "Any other object or purpose, wholly distinct from an intent to enable a third person to obtain money, goods or credit, * * can not be considered as of any importance, since the statute expressly declares that no action shall be brought to charge any person by reason of such representation, unless it be made in writing, and signed," etc. *Kimball v. Comstock*, 14 Gray, 508. *Hearn v. Waterhouse*, 39 Maine, 96.

Representations as to the character, conduct, credit, ability, trade or dealings of a third person, when the primary purpose for which such representations are made is, not to induce

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the extension of credit, or the delivery of money or goods to the person concerning whom they are made, but to secure the execution of a contract to which the person making them is a party, are not within the terms of the statute, and need not be in writing in order to be actionable. *St. John v. Hendrickson*, 81 Ind. 350; *Hassinger v. Newman*, 83 Ind. 124 (43 Am. R. 64).

When, however, such representations are made with the intent that a third person shall in the first instance obtain credit, money or goods thereupon, in order to give a cause of action against the person who made them, they must be in writing, signed, etc. *Mann v. Blanchard*, *supra*; *Medbury v. Watson*, 6 Met. 246; *Norton v. Huxley*, 13 Gray, 285; *Wells v. Prince*, 15 Gray, 562; *McKinney v. Whiting*, 8 Allen, 207; *Belcher v. Costello*, 122 Mass. 189.

Upon the foregoing considerations it must be concluded that the representations set out in the first and second paragraphs of the complaint were nothing more than the expression of opinions by Mr. Churchman concerning the credit and general financial and pecuniary ability of Thomas Cottrell. Being of that character, however unfounded such representations may have been, and whatever other ultimate end may have been in view, since it is averred that they were made "for the purpose of procuring plaintiffs to sell goods to Thomas G. Cottrell upon credit, and to accept Thomas Cottrell as guarantor for the payment of the purchase-money," they come within the terms and spirit of the statute, and are not actionable.

The argument of appellants' counsel which is directed more particularly to the third and fourth paragraphs of the complaint, may now be briefly considered. The contention is, that the representations set out in these paragraphs do not relate to the credit and ability of the person concerning whom they were made, but to the condition, quality and value of his property, and that, therefore, they are not within the protection of the statute. These representations are, in

substance, that the elder Cottrell was wealthy; that certain judgments, which were apparently debts against him and liens upon his property, were claims in his favor, and that he owned certain specific parcels of real property which were pointed out; that he was an honorable and fair-minded man, and that under his guaranty the plaintiff would be perfectly safe in selling goods to his son.

Since the exhaustive discussion in *Lyde v. Barnard*, 1 M. & W. 101, concerning the policy and purpose of Lord Tenterden's act, and the scope and meaning attributable to it, little remained to be added upon the subjects there discussed. The facts in that case were that the plaintiff had been induced by the defendant to advance a sum of money to a third person on the security of certain dividends of stocks of which he took an assignment. Upon inquiry the defendant represented that the stocks about to be assigned were charged with only three annuities, when the truth was they were, as the defendant well knew, charged with a mortgage of 20,000*l.* in addition to the three annuities. The point upon which the learned judges, who were equally divided in opinion, disagreed was, whether the representation should be held to relate to the *ability* of the person to whom the money was about to be advanced, or to the state and value of the particular property which it was proposed to assign as security. On the one hand, it was contended that false and fraudulent representations made to one concerning the condition, value and availability of particular property owned by another, with the intent, not to establish the general credit or trustworthiness of the owner, but to induce a loan to him on the security of such property, did not relate to the credit or general pecuniary ability of the owner, but to the condition and value of the particular property, and were, therefore, not within the protection of the statute. As against this, it was contended with great force of reason, that such representations related to the ability of the borrower, and were equally within the mischief intended to be prevented by the statute.

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Without further indicating our opinion upon the merits of the discussion, which was maintained with great vigor and ability on both sides, or as to the inclination of the authorities, some of which we have cited, it is sufficient to say that it was agreed on all hands that if the inquiries made by the plaintiff, in that case, had been made as they were in the case before us, for the purpose of ascertaining how far it was safe to trust the intended debtor's personal responsibility, and the representations made by the defendant had been for the purpose of establishing the intended debtor's personal credit and general pecuniary ability, such representations would have been within the statute.

Whatever representations were made by the defendant in this case, in respect to particular property, were not made with the intent to induce any transaction concerning such property. They were directed to the purpose of establishing the alleged owner's general credit and ability to answer the guaranty which was under contemplation. It was not proposed to take a conveyance of, or mortgage upon, the land as a security for the guaranty. The inquiry and representations concerning the real estate, and the liens upon it, had relation to the general pecuniary ability and trustworthiness of the owner, and were made with the intent to obtain general credit for him, and so, within the authority of *Lyde v. Barnard*, *supra*, and all the cases, the protection of the statute is extended over them.

The representations under consideration involve the principles underlying the case of *Swann v. Phillips*, 8 A. & E. 457. The facts there were that an attorney, desiring to secure a loan for his client, without other security, represented to the plaintiff that the proposed borrower could safely be trusted for the amount, because the title deeds to a certain estate which he had just bought were in his possession. These representations were false. It was held that as the representations thus made related to the ability of the borrower to pay, they were within the statute.

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There is nothing in the suggestion contained in the case of *Hunter v. Randall*, *supra*, which militates against the conclusions already reached. Nor do we think the principles governing the cases of *Bush v. Sprague*, 51 Mich. 41, and *Warren v. Barker*, 2 Duvall, 155, are in opposition to anything herein determined.

Our conclusion upon the whole matter is:

1. That representations made concerning the character, conduct, credit, ability, etc., of any other person, by one not a party to the transaction, with the intent that such other person shall obtain credit thereby, are within the statute.

2. That such representations, made by one so situate, for the purpose above mentioned, are equally within the statute, whether made as the result of a conspiracy or not.

3. That they are none the less within the statute, for having been fraudulently made, with an expectation that some incidental advantage may flow to the person making them from the credit induced thereby.

4. That representations concerning the particular property and assets of another, when made as above, with a view to establish the general credit and pecuniary ability of the other, are also within the statute.

We are without the aid of a brief on behalf of the appellee Thomas Cottrell, nor is the ruling, so far as it relates to him, made the subject of discussion by the appellants so far as we have observed. We are, therefore, left to conclude that his relation to the case is regarded with indifference by both sides.

We might say that the ground upon which the demurrer on his behalf was sustained is not apparent to us, but as the error assigned upon the ruling as to him is not discussed, we may regard the point as waived.

The judgment is, accordingly, affirmed, with costs.

Filed Dec. 8, 1885.

The Wabash Railway Company v. Williamson.

No. 11,917.

THE WABASH RAILWAY COMPANY v. WILLIAMSON.

RAILROAD.—*Liability to Third Persons for Stock Killed at Private Crossings.*—*Case Explained.*—Where, for the convenience of a farmer whose lands lie on both sides of a railroad, gates are put in the fence on each side of the track for a private crossing, he assumes the risk of all increased danger resulting therefrom, and as to him the track will be considered as having been securely fenced as the statute (section 4031, R. S. 1881) requires; but as to all other persons the railroad company is bound, at its peril, to keep the gates closed. *Grand Rapids, etc., R. R. Co. v. Jones*, 81 Ind. 523, explained.

SAME.—*Cattle-Pits.*—*Quere*, whether a railroad company can relieve itself from liability to all persons for killing stock at a strictly private crossing by putting in cattle-pits and other safeguards, either instead of or in addition to gates in its fences?

INSTRUCTIONS TO JURY.—*When Court May Direct Verdict.*—When the controlling facts in a case are admitted or not controverted, it is not error for the court to instruct the jury as to what their verdict should be.

From the Miami Circuit Court.

C. B. Stuart and W. V. Stuart, for appellant.

A. Taylor, for appellee.

NIBLACK, C. J.—This action was commenced before a justice of the peace of Wabash county, by Robert F. Williamson against the Wabash Railway Company, for killing two mules, upon the alleged ground that the company's line of road was not securely fenced at the point at which the mules entered upon the track. Upon an appeal to the circuit court of that county, the venue was changed to the Miami Circuit Court, where the cause was tried by a jury. After all the evidence had been heard, the court instructed the jury to return a verdict for the plaintiff, assessing his damages at \$200, which was done accordingly, and, over a motion for a new trial and exceptions, judgment was rendered against the railway company for that amount of damages.

It was admitted at the trial that the railway company ran its road through the farm of John U. Pettit, in Wabash county, dividing the same into two parts, and that at the instance

104	154
137	211
104	154
1164	604
104	154
e166	393

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and for the convenience of Pettit, gates had been erected in and as a part of the railroad fence on each side of the road, thus enabling Pettit to cross from one part to the other of his farm; that the mules were being pastured on an adjoining farm belonging to one Allen Craft, and, by reason of an insufficient fence between the farm of Craft and the farm of Pettit, they crossed over onto the latter farm, and thence, through one of the gates at Pettit's private crossing, out upon and along the railway track where they were killed by the company's locomotive and cars; that the gate through which the mules passed out onto the track was standing open at the time, and had been left open by some person unknown to either of the parties; that the mules were the property of the plaintiff and were of the aggregate value of \$200, and that the plaintiff had no control of the Craft farm.

In argument much stress is laid upon the question as to whom the supposed negligence of permitting the gate to stand open for a time before the mules passed through it and were killed, ought to be imputed. As to how long the gate had so stood open, the evidence was conflicting, and it is for that reason argued that the circuit court erred in not submitting to the jury the question as to whom such supposed negligence ought to be imputed.

The real question in this case is, was the railway track securely fenced in at the point at which the mules entered upon it, within the meaning of section 4031, R. S. 1881?

As the gates were put in the fences at the instance and for the convenience of Pettit, he assumed the risk of any and all increased danger which might result to him and to his property from having gates instead of fences at the point in question. As to Pettit, therefore, the railway track must be considered as having been securely fenced at that point. As to all other persons, however, a different rule has been, and must continue to be, applied. As to all such other persons the railway company was required, at its peril, to keep the gates closed.

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We have had much difficulty in giving a practicable and reasonable construction to section 4031, *supra*, in all the varying cases, requiring a construction of that section, which have reached this court, but we regard the conclusions stated as above as fairly inferable from our decided cases involving that section, taken as a whole. *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Whitewater R. R. Co. v. Bridgett*, 94 Ind. 216; *Wabash, etc., R. W. Co. v. Tretts*, 96 Ind. 450; *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91; *Bond v. Evansville, etc., R. R. Co.*, 100 Ind. 301; *Louisville, etc., R. W. Co. v. Goodbar*, 102 Ind. 596.

The facts upon which the case of *Grand Rapids, etc., R. R. Co. v. Jones*, 81 Ind. 523, was decided, were quite analogous to those of this case. What was said in that case, however, as to the necessity of having suitable cattle-pits at an established crossing of a railroad track, was rather of an abstract character, and had a proper reference more particularly to crossings of public highways, and to such other places on railroad tracks as are generally used as crossings, with the consent of the proper railroad companies. In that case, Jones had no connection with, or responsibility for, the gate through which his horse entered upon the railroad track, and hence, as the railroad company had permitted that gate to be standing open when the horse passed through it, the track was not securely fenced in as against Jones, and it was upon that ground that the railroad company's liability really rested in that case.

It is an open question whether a railroad company can relieve itself entirely from liability to all persons for killing stock at a strictly private crossing by putting in cattle-pits and other kindred appliances, either instead of, or in addition to, gates in its fences. By a private crossing in this connection is meant a crossing neither required nor used for any public purpose. Cattle-pits, nevertheless, constitute an element of safety at private as well as at public crossings.

It follows, therefore, that the continuous risk ordinarily

 Ex Parte Hopkins, Assignee.

incurred by a railroad company at a merely private crossing is necessarily greater than at a public crossing, where a fence can neither be erected nor maintained. It also follows that the verdict in this case was right upon the evidence.

Some Missouri cases, cited by counsel, were decided under a statute different in some respects from our statute covering the same subject, and hence do not afford precedents which we ought to follow strictly.

When the controlling facts are admitted, as in this case, or are not controverted in any essential respect, it is not error for the court to instruct the jury as to what their verdict should be. *Carver v. Carver*, 97 Ind. 497.

The judgment is affirmed, with costs.

Filed Nov. 9, 1885.

 No. 12,483.

EX PARTE HOPKINS, ASSIGNEE.

104	157
152	457

ASSIGNMENT FOR BENEFIT OF CREDITORS.—Exemption.—One who makes a voluntary assignment for the benefit of his creditors, stands merely on the same footing as regards exemption of property as an execution debtor.

SAME.—Assignment by Partners.—An assignment by partners of the partnership property for the payment of the firm debts is valid, although it does not embrace the individual property of any of the partners.

SAME.—Partner not Entitled to Exemption from Firm Assets.—Where partners make a voluntary assignment of the partnership property for the benefit of their creditors, they are not entitled to any exemption from such property until the partnership debts are fully paid.

From the Washington Circuit Court.

D. M. Alsbaugh, J. C. Lawler, S. B. Voyles and H. Morris,
for appellant.

Howk, J.—On the 1st day of February, 1883, William F. Alexander and William R. Logan, then partners in busi-

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ness under the firm name of W. F. Alexander & Co., at Salem, in Washington county, being indebted and in embarrassed and failing circumstances, made a voluntary assignment to the appellant Hopkins, in trust for the benefit of all their *bona fide* creditors, of all their property, rights, credits, moneys and effects, of every kind and description. The appellant Hopkins accepted the trust, qualified and entered upon the discharge of his duties as such assignee. On the 29th day of December, 1884, the assignee Hopkins submitted to the court a verified report of his proceedings, as such assignee, which report he asked the court to approve and confirm, and to discharge him from the duties of his trust.

Upon this report, the court made a special finding of facts, and stated its conclusions of law thereon, in substance, as follows:

The court finds that William F. Alexander and William R. Logan were partners, doing business under the name and style of W. F. Alexander & Co.; that as such partners and individuals, they made a voluntary assignment to George E. Hopkins, under the statute of the State of Indiana regulating voluntary assignments for the benefit of creditors; that all of the property assigned was partnership property, no individual property of either of the assignors being included in such assignment; that all the indebtedness filed and allowed against the estate of said assignors, and against said assignee, was copartnership indebtedness, there being no indebtedness of either of said assignors filed and allowed. And the court further finds, that the appraisers set off to and said assignee allowed each of said assignors to claim and hold, from said partnership property, goods and cash to the value of \$600 each, making a total of \$1,200, as exempt under said statute from sale for the payment of the indebtedness, and said assignee now claims credit for said sum of \$1,200, exempted from sale as aforesaid.

Upon the foregoing facts, the court states as a conclusion of law, that said assignors are not entitled to take or hold

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any goods, chattels or money, of or belonging to said partnership assets, as exempt from sale, until the copartnership debts are paid. And the court refuses to confirm said report and allow said credit of \$1,200 to said assignee, and the remainder of said report the court finds to be correct, and said assignee is ordered to collect from said assignors the sum of \$600 each, and to pay the same into court for the use and benefit of the creditors herein, to which ruling of the court and conclusion of law, the assignee George E. Hopkins at the time excepts.

From the action of the circuit court upon his report, the assignee Hopkins prosecutes this appeal and has here assigned errors which call in question the court's conclusion of law, its refusal to confirm his report, and its order directing him to collect from each assignor the sum allowed him as an exemption. In argument, however, the assignee's counsel expressly state "that there is but one question in this case, namely: Are the partners entitled to the exemption provided for by section 2670, R. S. 1881, from partnership assets, where there are no individual assets?"

We are authorized, therefore, to confine our opinion in this case to the consideration and decision of this one question, especially so, we think, as no other question is even suggested by the assignee's counsel in their brief of this cause.

Under the law of this State providing for voluntary assignments of personal and real property in trust for the benefit of creditors, which has been in force since August 6th, 1859, it has been held by this court, and correctly so we think, that an assignment by copartners of all the copartnership property, for the payment of the partnership debts, will be valid, although it does not embrace the individual property of any of the partners. *Blake v. Faulkner*, 18 Ind. 47. In this case the court found, as we have seen, that all of the property assigned was partnership property, and that no individual property of either of the partners was included in their assignment. The indenture of assignment, which appears in

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the record of this cause, shows upon its face that it was executed in trust for the benefit of all the *bona fide* creditors of the partnership, and the individual creditors of either of the partners, if there were any, were not mentioned or provided for in such indenture. The court found that all the indebtedness, filed and allowed against the trust estate or against the assignee, was copartnership indebtedness, and that no individual debt of either of the partners had been filed and allowed.

In the ninth section of the voluntary assignment law (section 2670, R. S. 1881), it is provided as follows: "If the assignor is a resident householder of this State, said appraisers shall set off to said assignor such articles of property or so much of the real estate mentioned in the inventory as he may select, so that the same shall not exceed three hundred dollars; and the appraisers shall in their appraisal specify what articles of property and the value thereof, or what part of the real estate and its value, they have so set apart to the assignor."

Assuming to act under this section of the statute, as we may suppose, the appraisers set apart to each of the assignors, and the assignee allowed him, out of the assigned partnership property, in personal goods and money, the sum of six hundred dollars in value, as exempt from the operation of their assignment. It will be observed that the exemption allowed to each of the assignors was in double the sum specified in the section quoted of the voluntary assignment law. This section has never been expressly amended; but it was held by this court, in *O'Neil v. Beck*, 69 Ind. 239, that such section had been amended by implication so as to enlarge the assignor's exemption to the sum of \$600. The court there said: "We think it clear that it was intended by the act of 1859 to exempt from the assignment, and to save to the debtor, just the amount that was exempted from sale on execution against the debtor. In each case the amount of the exemption was \$300. * * * The act of 1879 increases the amount of property exempted from sale on execution for debts to \$600. And we think, in accordance with the spirit

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and purpose of the act of 1879, it should be held to equally enlarge by implication the amount to be reserved to the debtor making an assignment under the act of 1859."

We are impressed with the opinion that it was the intention of the General Assembly, in the enactment of the exemption section above quoted of the voluntary assignment law, to place the failing debtor, who voluntarily surrenders all his property for the benefit of all his creditors, under such law, on precisely the same footing and to give him precisely the same right, no greater and no less, as to the exemption of a reasonable amount of his property from seizure or sale for the payment of his debts, as the execution debtor had under the existing law of this State. It is settled by the decisions of this court, however, that partnership property, or an interest therein, can not be claimed by a member of the firm as exempt from sale on execution for a partnership debt. *Love v. Blair*, 72 Ind. 281; *Smith v. Harris*, 76 Ind. 104; *State, ex rel., v. Emmons*, 99 Ind. 452.

The interest of a partner in partnership property is not an interest in the specific property, but an interest in what may remain of the partnership assets, after the payment and discharge of all debts and liabilities of the firm to third persons and to each other, upon the close of the copartnership business. *Donellan v. Hardy*, 57 Ind. 393. We are of opinion that the assignors in a voluntary assignment for the benefit of creditors, under our statute, are no more entitled than would be an execution defendant to claim, as an exemption, a specific part or share of the partnership property, or any interest therein. The court did not err, therefore, in holding as its conclusion of law, that the assignors were not entitled to take or hold any goods, chattels or money, of or belonging to the partnership assets, as exempt from sale, until the partnership debts were fully paid.

The judgment is affirmed, with costs.

Filed Oct. 9, 1885; petition for a rehearing overruled Dec. 10, 1885.

Bothwell v. Millikan.

No. 12,033.

BOTHWELL v. MILLIKAN.

104	108
125	548
104	108
138	271
104	102
155	502
104	102
161	880

GRAVEL ROAD.—*Collection of Assessment by Sale of Real Estate.*—Under section 5097, R. S. 1881, an assessment for the construction of a gravel road may be collected as other taxes by a sale of real estate by the county treasurer.

SAME.—*Lien of Purchaser for Taxes Paid.*—Where the sale does not operate to convey title, the purchaser takes a lien for all taxes paid by him, together with the statutory penalty.

SAME.—*Tender.*—*Pleading.*—One seeking relief from a sale of land for taxes, must make a tender of the amount due, and where the amount is capable of computation, the plaintiff must state in his complaint the sum tendered, so the court may determine its sufficiency.

SAME.—An averment in the complaint, that the plaintiff "offered to pay the defendant all money due to him" for the sum paid by the latter on the sale, without stating the amount, is not sufficient.

HARMLESS ERROR.—*Practice.*—Where the ultimate judgment is one of which the appellant can not complain, intermediate errors are harmless.

COSTS.—*Complaint to Quiet Title.*—*Counter-Claim to Foreclose Lien.*—Where a plaintiff brings a suit to quiet title, and the defendant, by a counter-claim, sets forth a lien and obtains a judgment against the plaintiff foreclosing it, he is entitled to recover costs.

From the Morgan Circuit Court.

W. S. Shirley, for appellant.

G. A. Adams and J. S. Newby, for appellee.

ELLIOTT, J.—The principal question in this case is as to the authority of the treasurer to sell real estate upon an assessment made for building a gravel road.

The constitutionality of the statute authorizing the levying of taxes for constructing gravel roads has been so many times affirmed by this court, and by other courts, that the question may be considered as at rest. The authority to enact such statutes being assumed, the only question is as to their force and effect.

The statute providing for the assessment of taxes for the construction of gravel roads plainly contemplates that such taxes may be collected as other taxes, by sale of property. R.

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§. 1881, section 5097. It would completely nullify the statute to hold that there is a lien for such taxes, but no power to enforce the lien. We are clearly of the opinion that such taxes may be collected by a sale of property. We can not hold that the Legislature meant to do such a vain thing as to create a lien without providing means of enforcing it. There is certainly nothing in the statute leading to any such conclusion.

Where the sale does not operate to convey title, the purchaser secures a lien for all taxes paid by him, together with the statutory penalty. The trial court did right in holding that the purchaser acquired a lien although the sale was void.

The statute places taxes assessed for the construction of gravel roads on substantially the same footing as other taxes, and all the usual incidents attach to a sale made for gravel road taxes, among them the right to the statutory penalty.

There was general authority to levy the tax and sell the property of the appellant, and he could not have relief without making a tender of the amount due the appellee. *Peckham v. Millikan*, 99 Ind. 352; *Ricketts v. Spraker*, 77 Ind. 371, p. 376; *McWhinney v. Brinker*, 64 Ind. 360; *City of Delphi v. Bowen*, 61 Ind. 29, *vide* auth. p. 33.

The complaint does not plead a sufficient tender. The sum due the appellee was capable of exact computation, and it was the duty of the appellant to state in his complaint the sum tendered, so as to enable the court to judge whether the tender was sufficient. *Conwell v. Claypool*, 8 Blackf. 124; *Miller v. McGehee*, 60 Miss. 903; *Chase v. Welsh*, 45 Mich. 345. The appellant's complaint does not even aver that he tendered the taxes and penalty; it simply avers that he "has offered to pay to the defendant all money due to him for said sum so paid to the said treasurer and auditor on said sale as aforesaid, which he refused to accept." This is plainly insufficient. It is not for the plaintiff to determine what is due the defendant; that is for the court upon the facts stated.

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Aside from this consideration, it appears that the pleading is bad, for the theory of the complaint is that if the defendant was entitled to anything at all, it was simply the money actually paid out by him, and the inference, therefore, is that this was all that was tendered. Upon this assumption the tender was insufficient, because the appellee was entitled to the statutory penalty.

Judgment affirmed.

Filed Oct. 23, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The appellant complains that we did not decide what penalty the appellee was entitled to recover, and insists that we now decide that question. We did not deem it necessary to expressly decide the question, for the reason that the judgment was for a less sum than the appellee was entitled to recover, even computing the penalty at the lowest sum fixed by any of the statutes upon the subject of taxes. Where the ultimate judgment is one of which the appellant can not justly complain, intermediate errors are harmless. *Krug v. Davis*, 101 Ind. 75.

Another point urged in the petition is, that we did not discuss the ruling on the motion to tax costs. This point we now expressly decide against the appellant without discussion, for we think the question so free from difficulty as not to require discussion. What we decide is this: Where a plaintiff brings a suit to quiet title, and the defendant, by a counter-claim, sets forth a lien, and obtains a judgment against the plaintiff foreclosing the lien, he is entitled to recover costs.

Petition overruled.

Filed Dec. 9, 1885.

Anderson v. Worley.

No. 12,301.

ANDERSON v. WORLEY.

TRESPASSING ANIMALS.—Estrays.—Statute Construed.—The right, under section 4837, R. S. 1881, to detain and treat trespassing animals as estrays, is confined to cases where such animals "break into the inclosure" of any person, and not where they wander upon the uninclosed lands of another.

SAME.—Damages.—Replevin.—Where the animals of a known owner temporarily escape from his inclosure, and are found trespassing on the uninclosed lands of another, the latter has no right to seize and detain the animals for the purpose of enforcing payment of damages and costs under the estray law; and for animals so detained the owner may maintain replevin.

From the Lake Circuit Court.

E. Griffin and *C. F. Griffin*, for appellant.

T. S. Fancher, for appellee.

MITCHELL, J.—On the 24th day of September, 1883, Worley's cattle, twenty-four in number, escaped through the fence enclosing his pasture, into a lane between Anderson's land and his own. Going thence over some uninclosed lands belonging to Anderson, they were found in the latter's corn-field, which was partially uninclosed. After being in his field for the space of about an hour, the animals were driven out by Anderson and confined in a lot on his farm. In less than an hour afterwards Worley appeared, offered to pay the damages, and requested permission to take his cattle. This was refused, except upon condition that he would pay one dollar and fifty cents for each animal. Worley, on the same day, called three neighbors, who appraised Anderson's damage at two dollars, whereupon the former tendered him three dollars and demanded his cattle. Failing to obtain possession, Worley commenced this action for the recovery of his animals on the 25th day of September, 1883.

There was a trial by the court, finding that the plaintiff was the owner of the property, and that the damages, amounting to two dollars and twenty-eight cents, had been tendered

and brought into court for the defendant; judgment accordingly.

The appellant contends that the owner of the animals was not entitled to recover possession of them until he had first paid "fifty cents a head and paid the appraisers' fees."

Conceding that the appellant's cornfield was not inclosed, his counsel, nevertheless, undertake to maintain that section 4837, R. S. 1881, is applicable to the case. That section provides that, "When any domestic animal shall break into the inclosure of any person, such person, without regard to the season of the year, may take up such animal as if an estray, whether the owner be known to him or not, and shall proceed as provided by law of estrays, except as herein provided."

We think the right to detain and treat trespassing animals as estrays under the foregoing section, where such animals escape from their owner, is confined to cases where such animals "break into an inclosure," and not where they wander upon the uninclosed land of another.

Under section 4835 damages are recoverable by the owner of lands where domestic animals break into an inclosure, or wander upon the lands of another; and where animals are not permitted by order of the county board to graze upon the uninclosed commons, such damages are recoverable whether the lands are inclosed or uninclosed.

There is no controversy in this case about the damages. The question was whether the owner of the uninclosed cornfield, on which the animals were found trespassing, might detain them from the owner until the damages, including the fees provided in the act concerning estrays, were paid. The court below, we think, correctly held that he could not so hold them.

This summary method of enforcing payment of damages, and costs of taking up, applies only to inclosed lands, or to animals which are estray. Every person is bound to confine his animals to his own lands, except as regulated by order of

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the board of commissioners. He is liable for all damages done by his animals upon the lands of others, whether such lands are inclosed or uninclosed; but for trespasses of cattle escaped from a known owner, upon uninclosed lands, the land-owner is not authorized to seize the animals for the purpose of enforcing payment of damages and costs.

Judgment affirmed, with costs.

Filed Dec. 9, 1885.

No. 12,228.

HARLAN v. JONES.

104	167
190	158

Taxes.—Lien for Taxes Paid while Holding Title.—Volunteer.—One who, while holding the title to real estate under a sheriff's sale, redeems it from a tax sale, and also pays other taxes thereon, may, where such sheriff's sale is set aside, enforce a lien for the taxes paid, as he can not be deemed a volunteer.

From the Tipton Circuit Court.

N. R. Lindsay and J. W. Kern, for appellant.

J. W. Robinson, for appellee.

ELLIOTT, J.—The material allegations of the appellee's complaint are these: Creditors of Joshua K. Harlan obtained judgments against him, and also obtained a decree declaring that a conveyance to his wife, the appellant, of the land described in the complaint, was fraudulent, and adjudged that it be set aside. On these judgments the land was sold, the appellee purchased it, and subsequently received a deed from the sheriff. A complaint to review the judgment, declaring the conveyance fraudulent, was afterwards filed by the appellant, and she succeeded in having that judgment annulled. The appellee redeemed the land from a tax sale and also paid taxes that accrued upon the land, and this suit was brought to enforce a lien for the taxes paid.

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The appellant's counsel contend that the payment of the taxes by the appellee was voluntary. This position is not tenable. The appellee had color of title, and, indeed, as long as the judgment declaring the land to be subject to sale on the executions against Joshua K. Harlan stood unreversed, he had a valid title. He can not, therefore, be deemed a mere volunteer. He did not pay the taxes for the purpose of making himself the creditor of the appellant, but for the purpose of protecting from sale land to which it had been adjudged by a court of general jurisdiction the appellant had no title. In no just sense can the appellee be regarded as a volunteer, seeking to make another his debtor. We have no doubt that the appellee has a right to enforce a lien for the taxes paid by him.

Judgment affirmed.

Filed Dec. 9, 1885.

104	168
132	390
104	168
136	422
104	168
137	392
138	665

No. 11,184.

THE SCHOOL TOWN OF MONTICELLO v. GRANT ET AL.

EVIDENCE.—Pleadings.—The pleadings in a cause, as well as the other papers constituting the basis of the action, are before the court without being read in evidence.

PRACTICE.—Amendment of Complaint.—Statute of Limitations.—An amendment to a complaint has relation to the time at which the complaint was filed. It is only where the amendment sets up some claim or title, not previously asserted, and involving the statute of limitations, that a different rule applies.

SAME.—School Corporation.—Where it is apparent that a town was sued as a school corporation, but it is not specifically described as such in the complaint, the filing of an amended complaint so describing it relates back to the time of filing the original complaint.

SALE.—Payment in Void Securities.—Where a sale is for cash, and securities which are void, or prove to be void, are taken in payment, the creditor may sue and recover on the original cause of action.

The School Town of Monticello v. Grant *et al.*

SAME.—Question for Jury.—Weight of Evidence.—Whether a given transaction, in a controverted case, constitutes a payment, is a question for the jury, and its verdict will not be disturbed on the weight of the evidence.

From the Cass Circuit Court.

A. W. Reynolds, E. B. Sellers, M. Winfield and C. E. Taber,
for appellant.

S. T. McConnell, for appellees.

NIBLACK, J.—The proceedings which resulted in this appeal were commenced in the White Circuit Court on the 22d day of April, 1876, by George H. Grant, Turner W. Haynes and William F. Spencer, partners, constituting the firm of George H. Grant & Co., against "the Town of Monticello, a corporation for school purposes."

The summons was served on the president of the board of trustees, and the clerk and treasurer, of the town of Monticello, and on Hannawalt, Bushnell and Sims, school trustees of said town.

The action was for school desks and school furniture used in a school building, and the venue was changed to the Carroll Circuit Court, where, on the 3d day of May, 1877, the plaintiffs, by leave of court, filed an amended complaint, substantially the same as the complaint first filed, except that it described the defendant as the "School" Town of Monticello.

The defendant answered:

First. In denial.

Second. Payment.

Third. The six years' statute of limitations.

Issues were formed upon the second and thirds paragraphs of answer, and there was a verdict and judgment for the defendant. That judgment was reversed by this court. *Grant v. School Town of Monticello*, 71 Ind. 58.

After the cause was remanded, the venue was again changed to the Cass Circuit Court, where some additional paragraphs of answer were filed, upon which issues were joined, and

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where a second trial resulted in a verdict and judgment for the plaintiffs, and in the prosecution of this appeal.

The questions discussed by counsel are such only as were reserved upon the appellant's motion for a new trial.

This court held at the former hearing, that upon the evidence then before it the demand in suit was not barred by the statute of limitations, and, so far as that question is now involved, the evidence in the record before us is substantially the same as it was at that hearing.

It was then, as it still is, a settled rule of judicial construction that the pleadings in the cause, as well as the other papers constituting the basis of the action, are before the court without being read in evidence. *New Albany, etc., P. R. Co. v. Stalloup*, 62 Ind. 345; *Boots v. Canine*, 94 Ind. 408. It may, therefore, be accepted as the law of this case that the demand was not barred by the statute of limitations when the action was commenced.

When this case was here before, the present appellant made the point that the amended complaint, describing the defendant as the "School" Town of Monticello, was the substitution of a new and materially different complaint, as compared with the one first filed, and was hence the commencement of a new action against another defendant more than six years after the cause of action had accrued, but this court made no distinct ruling upon that particular point as it was then presented, and because of that seeming omission the same point is now renewed and urged with much earnestness and elaboration, citing *Miller v. McIntire*, 1 McLean, 85, *Lagow v. Neilson*, 10 Ind. 183, *Jones v. Porter*, 23 Ind. 66, *Hawthorn v. State, ex rel.*, 57 Ind. 286, and *Floyd v. Floyd*, 90 Ind. 130. These authorities have reference to cases in which new parties are brought before the court by amendment, and not to cases in which there is an amended description of a defendant already before the court, whether by the due service of process or otherwise. The general rule is, that an amendment to a complaint has relation to the time at which the com-

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plaint was filed. It is only, so far as we have observed, where the amendment sets up some claim or title, not previously asserted, and involving the statute of limitations, that a different rule has been applied. It was plainly inferable from the facts averred in the original complaint, as well as from the persons upon whom process was served, that the appellant was sued as a school corporation. The amendment, therefore, which more formally described the appellant as a school corporation, did not in any manner change the nature of the action, and clearly had relation to the time at which the first complaint was filed. Such an amendment was authorized and inferentially recognized as a merely formal proceeding by section 99 of the code of 1852, which was in force when the amendment was made.

It was shown by the evidence that in August, 1870, George H. Grant & Co., upon an order previously given, shipped and delivered to the school trustees of the town of Monticello school desks, and other school furniture, amounting in value to the sum of \$1,549.20, and that the school trustees in turn afterwards delivered to Grant & Co. county bonds, issued by the board of commissioners of White county, for a corresponding amount. Whether these bonds were transferred to Grant & Co. under circumstances which constituted the transaction a payment for the school desks and other school furniture in question, was, aside from the question of the statute of limitations, the only matter really in controversy at the trial. These bonds, with others issued at the same time, were held by this court to have been unlawfully issued, and hence valueless, after they fell into the hands of Grant & Co., and this suit is one of the results of that holding. See *Rothrock v. Carr*, 55 Ind. 334.

It is true, as contended by appellant's counsel, that where, in a fair transaction, one commodity is given simply in exchange for another, the party receiving such commodity in exchange can not repudiate the arrangement and demand other compensation because the commodity he accepted has proven

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to be of no value. It is also true, in a general sense, that "any thing is a payment which the creditor accepts as a payment," but that is upon the implied understanding that the thing received in payment is presumably of some value, either general or special, to the creditor. When, however, a sale is for cash, and securities which are void, or prove to be void, are taken in payment, the creditor may sue and recover on the original cause of action. Whether a given transaction, in a controverted case, constitutes a payment, is a question for the jury to decide upon the evidence, and in such a case the conclusion reached by the jury will not be disturbed in this court upon what may appear to be the mere weight of the evidence.

Questions are made here on several of the instructions given by the circuit court at the trial, but the general principles herein above announced practically decide all questions argued upon the instructions.

Taken as a whole, we see no available error in any part of the instructions.

The jury were, in effect, required by the instructions to determine whether the transaction in controversy was an exchange simply, or whether the bonds were accepted absolutely in payment, or only contingently or collaterally. There was evidence strongly tending to sustain the verdict. No sufficient cause has, consequently, been shown for a reversal of the judgment either upon the instructions or the evidence.

The following authorities are cited as having some relation to the questions discussed in the latter part of this opinion. *Ridenour v. McClurkin*, 6 Blackf. 411; *Louden v. Birt*, 4 Ind. 566; *Tilford v. Roberts*, 8 Ind. 254; *Brown v. Killian*, 11 Ind. 449; *Dakin v. Anderson*, 18 Ind. 52; *Richards v. Stogsdell*, 21 Ind. 74; *Hart v. Crawford*, 41 Ind. 197; *Wingate v. Neidlinger*, 50 Ind. 520; 2 Greenl. Ev. (14th ed.), section 523, and authorities cited.

The judgment is affirmed, at the appellant's costs.

Filed May 26, 1885; petition for a rehearing overruled Dec. 10, 1885.

Burk v. Simonson.

No. 10,558.

BURK v. SIMONSON.

WATERCOURSE.—Change of Channel.—Riparian Owner.—Acquiescence.—Estoppel.—Presumption.—Where a change is made in the flow of a natural watercourse, either artificially or otherwise, and riparian owners acquiesce in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, and precludes a restoration of the stream and its surroundings to their original condition.

SAME.—Canal.—Right of Way.—Eminent Domain.—Benefits and Damages.—Presumption.—Statute of Limitations.—Where land is taken for a right of way for a canal under condemnation proceedings for that purpose, it will be presumed that all direct benefits to the owner were included in the assessment of damages; and where the canal company constructs embankments and structures which protect a riparian owner's land from overflow, and maintains them for such a period of time as to permit the running of the statute of limitations, it will be presumed that the acquiescence of the owner of the fee was due in part to the benefit which accrued to his land from such embankments and structures, and that all the damages were assessed and paid.

SAME.—Abandonment of Canal.—Rights of Riparian Owner.—In such case the abandonment of the canal will not divest the owner of the fee of his right to have the embankments and other structures maintained permanently for the protection of his land.

INJUNCTION.—Watercourse.—State of Stream.—Where a person is undertaking to destroy an existing watercourse, or to wrongfully change the existing state of the stream, so as to materially injure another's land, the latter is entitled to an injunction.

SUPREME COURT.—Submission by Agreement.—Dismissal of Appeal.—Notice to Co-parties.—Where, on appeal, a cause is submitted by agreement, a motion to dismiss on the ground that notice of the appeal has not been given to co-parties, comes too late to be available.

COURTS.—Jurisdiction.—State Comity.—The courts of this State have jurisdiction to prevent a wrong to a citizen of another State where the wrong consists in doing an act upon land in this State.

From the Dearborn Circuit Court.

F. Adkinson, A. W. Gaines, R. Hill and R. N. Lamb, for appellant.

H. S. Given, H. D. McMullen and D. T. Downey, for appellee.

ELLIOTT, J.—There are four paragraphs in the appellant's complaint, and to all of them demurrers were sustained.

104	173
133	164
104	173
143	152
104	173
151	539
104	173
156	273
104	173
164	670

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Shortly stated, the case made by the complaint is this: The appellant inherited land from his father, who acquired it in 1809; the appellee owns land lying adjoining and immediately above that owned by the appellant. In 1838 the Whitewater Canal Company acquired a right of way for the construction of a canal through the lands now owned by these parties, and constructed a canal upon the right of way so acquired. In constructing the canal, a ditch twenty-five feet deep and twenty feet wide was dug along the bank of the Whitewater river. For the purpose of obtaining water for the canal, a feeder-dam was constructed across that river opposite the appellee's land, and a ditch cut from the river to the canal. To protect the land now owned by these parties from being flooded, and to regulate the flow of water from the river into the canal, the company constructed a lock, with stone walls and abutments, by means of which the water was conducted into the canal without injury to adjoining lands. The construction of the dam raised the bed of the river because of the sediment which it caught and caused to be deposited. In 1866 the dam was broken, and the greater part washed away. The canal was then abandoned, but the canal, with all its appurtenances, still belongs to the Whitewater Canal Company. In the condition that the lock, appurtenances, and the embankments now are, no water flows into the canal when the river is in its usual stage, but in times of ordinary freshets it does flow from the river into the channel of the canal. If the lock, appurtenances and embankments are removed, the water from the river will flow into the channel of the canal, the land of the appellant will be flooded, and his soil washed away. The lock and embankments are necessary to prevent the flooding of the land, and their removal will expose it to injury from overflows. The appellee, without right, is engaged in tearing away the lock and its appurtenances.

The lock and appurtenances did not belong to the appel-

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lant, and he can not maintain an action as owner, although the appellee is a trespasser.

If there is any cause of action in the appellant, it must rest upon the ground that he has acquired a right to have the artificial structures, the lock, abutments, and embankments remain unchanged. If there were an express contract vesting in him this right, there would be comparatively little difficulty in the case, but no such contract exists, and we are to examine what grounds, if any there are, upon which the asserted cause of action can be justly placed.

It is said that one riparian owner must so use the waters of a stream as not to injure other proprietors. We grant this proposition as applied to natural streams, but it does not meet this case. *Angell Watercourses*, sections 332, 335, 339; *Hebron G. R. Co. v. Harvey*, 90 Ind. 192 (46 Am. R. 199); *Pence v. Garrison*, 93 Ind. 345; *Harris v. Macintosh*, 133 Mass. 228. The question here is, not as to the right to divert the waters of a natural stream, but as to the right to remove artificial structures and embankments erected in changing the state of a natural stream, and thus restore the stream to its original condition. To such a case the doctrine found in *Pence v. Garrison*, *supra*, and 1 High on Injunctions, sections 794, 815, does not apply.

Eliminating, as we have done, the irrelevant arguments advanced, and clearing the case of matters foreign to its merits, we find the real question to be this, has the appellant a right to have continued the artificial structures which so changed the natural watercourse as to protect his land from injury?

Upon this question the law is with the appellant. There are two reasons for this conclusion. Of these in their order: *First*. The long acquiescence in the change made in 1838 precludes a restoration of the stream and its surroundings to their original condition.

Our proposition is well supported by authority. *Middleton v. Gregorie*, 2 Rich. (S. C.) 631, is a well reasoned

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case, and we make the following extract from it: "No one has a right to divert a stream from its natural current, to the prejudice of those who own lands below. But where it has been done by a party above for twenty years, his original wrong has ripened into a prescriptive right. Let the proposition be reversed. Is the party below incapable of acquiring a right of exemption from having his land overflowed, by the water's being restored to its natural course? This is what the plaintiff contends for. He says, for more than forty years he has accommodated himself to a state of things existing by mutual consent, or brought about by the acts of the planters above. By way of illustrating his position, suppose that in consequence of the dam he had cut down and drained the land lying next to the river, and had planted it in some crop requiring entirely a dry culture—such as corn or cotton. Would the defendant have a right to cut his dam and destroy the growing crop? For all legal purposes, the plaintiff might, under such circumstances, have regarded his land as though the water had never flowed through it. Indeed, I think he would have as much right to enjoy his property in security, as if he had cultivated dry land above; and it is very clear, that where one has land lying adjacent to a stream, and a proprietor below dams the water back on him, the former has a right of action to abate the nuisance."

In *Woodbury v. Short*, 17 Vt. 387, it was held, that, after ten years' acquiescence in the change of a natural stream, a riparian owner can not restore a stream to its original condition where it would injure another owner. The subject received more careful consideration in the case of *Ford v. Whitlock*, 27 Vt. 265, where it was said: "But if the diversion affects other proprietors favorably, and the party on whose land the diversion is made acquiesces in the stream running in the new channel, for so long a time that new rights may be presumed to have accrued, or have in fact accrued, in faith of the new state of the stream, the party is bound by such acquiescence, and can not return the stream to its former

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channel." It is said by a recent writer that, "When a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream can not be lawfully returned to its former channel." Gould Waters, section 159.

Of the second reason, for our proposition: Where land is acquired for a public purpose, as a canal, railroad, or the like, direct benefits to the owner from its construction are deemed part of the consideration paid by the corporation acquiring the right to construct the public work. This was so under the act which created the Whitewater Canal Company and endowed it with corporate powers. *McIntire v. State*, 5 Blackf. 384; *State v. Digby*, 5 Blackf. 543; *Vanblaricum v. State*, 7 Blackf. 209. If embankments and abutments essential to the construction and maintenance of the canal did protect the appellant's land from overflow, they were to that extent a benefit, and the presumption is that this benefit was taken into consideration, for the ordinary rule is, that a contract for a right of way for a canal, or a condemnation for that purpose and the assessment of damages, includes all direct benefits and damages, thus precluding an owner from maintaining a subsequent action for damages. Where the use of land is continued for such a period as to permit the running of the statute of limitations, the presumption is that all damages were assessed and paid. *The Brookville, etc., Co. v. Butler*, 91 Ind. 134 (46 Am. R. 580); *Nelson v. Fleming*, 56 Ind. 310. The same principle must apply here; it must be presumed that the long acquiescence of the owner of the fee was due, in part at least, to the benefit which accrued to his land from the embankments and structures constructed by the canal company.

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The abandonment of the canal did not divest the appellant of his rights nor invest the appellee with authority to deprive him of them. The embankment which protected the latter's land was a benefit to him, and this benefit could not be taken from him. The right thus secured him was a permanent one.

If the appellee or his grantors had in no way consented to the erection of the embankments, he would not be bound by the act of the canal company, but consent was originally given to the change in the state of the watercourse, and for a long series of years the change was acquiesced in by all who were interested in the matter. The building of the dam, the digging of the channel of the canal, the construction of the lock, and the erection of the embankments, were parts of one general undertaking, in which the canal company and the adjoining owners were interested and to which they mutually consented.

Where a defendant is undertaking to destroy an existing watercourse, or to wrongfully change the existing state of the stream, so as to materially injure the plaintiff's land, the latter is entitled to an injunction. *Pence v. Garrison*, *supra*; *Oliver v. New York Bay Cem. Co.*, 38 N. J. Eq. 109; *Gould Waters*, section 513.

Where a cause is submitted by agreement, a motion to dismiss on the ground that notice of the appeal has not been given to co-parties, comes too late to be of avail. 2 *Works Pr.*, section 1094, auth. n.; *People's Savings Bank v. Finney*, 63 Ind. 460; *Field v. Burton*, 71 Ind. 380; *Easter v. Severin*, 78 Ind. 540; *Hendricks v. Frank*, 86 Ind. 278; *Martin v. Orr*, 96 Ind. 491.

Judgment reversed.

Filed Sept. 24, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—No brief was filed on the merits of the case until after the opinion was filed, although the cause was sub-

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mitted in November, 1882. Under the established rule, we might well dispose of the case by saying that points not made on the original argument will not be considered on a petition for a rehearing, but, in this instance, we have thought that we are, perhaps, justified in departing from that rule.

It is now said that there was no ruling on the demurrer to the first paragraph of the complaint. There is some confusion in the record, but we think that it shows that the amended complaint supplanted the original, and that it was to all the paragraphs of this amended complaint that the demurrer was sustained. At all events, judgment upon demurrer went against the appellant upon all the paragraphs of his complaint, and this was clearly error, for it certainly is wrong to render judgment upon demurrer, where there is one good paragraph of a complaint unchallenged. It is manifestly error to render judgment against a plaintiff on demurrer, if he has one good paragraph of complaint on file. Whether we regard the amended complaint as entirely supplanting the original, or whether we hold that there was one good paragraph unchallenged, there was material error. But there is error properly assigned upon the ruling on the demurrer to each of the four paragraphs of the complaint, and, as these were all good, the judgment was erroneous, for the general rule is that a party is entitled to a reversal if a demurrer is wrongfully sustained to any one of the paragraphs of his complaint.

It is said that the appellee's land ought not to be burdened for the benefit of the appellant's land, for the reason that the land of the latter is in Ohio. We regard it as quite clear that our courts may prevent a wrong to a citizen of another State in cases where the wrong consists in doing an act upon land within our jurisdiction.

Petition overruled.

Filed Dec. 9, 1885.

Kelso v. Fleming.

No. 12,240.

KELSO v. FLEMING.

NOVATION.—*Elements of.*—Novation is the substitution of one debtor, by mutual agreement, for another, whereby the old debt is extinguished.

SAME.—*Assumption of Debt by Purchaser of Real Estate.*—The agreement of a purchaser of real estate to pay a debt evidenced by a promissory note and secured by a mortgage, as a part of the purchase-price, even where the payee subsequently agrees to accept the purchaser as the payor and release the maker, does not constitute a novation.

SAME.—*Pleading.—Conclusion of Law.*—An averment that the payee did release the maker is the statement of a mere conclusion of law.

From the Dubois Circuit Court.

W. A. Traylor and W. S. Hunter, for appellant.

E. A. Ely, W. F. Townsend and — Bretz, for appellee.

MITCHELL, J.—This suit was brought to recover on a promissory note, dated June 3d, 1881, due in twelve months. The note was signed by A. T. Fleming, payable to Lemuel L. Kelso, and called for \$492. It was assigned by written endorsement, dated the 22d day of August, 1882, to Clara A. Thomas, who, it is alleged, has since intermarried with Zenas C. Kelso.

The only answer upon which any question arises presents the following facts: It avers that the day after the note was executed the defendant executed a mortgage conveying to the payee certain real estate as security for the debt. That subsequently, on the 2d day of May, 1883, the defendant sold and conveyed the land mortgaged to one Steen, who assumed the payment of the mortgage debt as part of the purchase-price. That the payee of the note agreed to accept Steen as the payor of the debt and release the defendant, and that, in pursuance of the agreement so made, he did release the defendant. It was averred further, that at the time this agreement was made the defendant had no notice of the assignment of the note.

A demurrer was overruled to the answer, and upon evidence tending to sustain it, there was a finding and judgment for the defendant.

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The ruling on the demurrer and the finding on the evidence are brought in question by the errors assigned.

The question discussed relates to the sufficiency of the facts pleaded in the answer and proved by the evidence to constitute a novation of the debt. That the assumption of the debt by Steen made him, as between himself and Fleming, primarily liable, is beyond question. *Birke v. Abbott*, 103 Ind. 1, and cases cited. It does not follow, however, that the original debtor was thereby released, or that the right of the holder of the note to proceed against him was in any manner affected. *Davis v. Hardy*, 76 Ind. 272; *Josselyn v. Edwards*, 57 Ind. 212.

Nor do we think that the averments that the payee agreed to accept the purchaser and release the maker of the note show any consideration upon which to claim a release or novation.

One of the essential elements to a novation is, that there should have been an extinguishment of the old debt; and another is, that there should have been a mutual agreement between all the parties, that the old debt should become the obligation of a new debtor.

The sale of the land and the assumption of the mortgage debt, so far as the answer discloses, was a separate, independent transaction between Fleming and Steen. The agreement between Kelso and Fleming, that the former would accept Steen as payor and release the defendant, was equally independent of the sale of the land and the assumption of the debt by the purchaser.

Upon the conveyance of the land to Steen and the assumption of the debt by him, Kelso's right to proceed against him was complete, and his subsequent agreement to release Fleming was without consideration to support it.

There was no agreement mutually entered into between all the parties, that Steen should become the debtor of Kelso, and that in consideration of his so agreeing Fleming's debt should be released. As between Fleming and Kelso, the

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debt remained the debt of the former; that Steen had assumed its payment by contract with Fleming, no consideration or benefit to Kelso appearing, did not extinguish the debt. The arrangement between Fleming and Steen, completed in the absence of Kelso, and subsequently assented to by him, did not constitute a consideration to uphold his agreement to release.

Novation means simply the substitution of one debtor by mutual agreement for another. It is a necessary incident of the transaction, that the old debt shall have been discharged by the new arrangement. The discharge of the old debt must be contemporaneous with, and result from the consummation of, the arrangement with the new debtor.

The most that can be made of the facts in this case is, that by the assumption of the debt by Steen, resulting from his agreement with his vendor, he came under an equitable obligation to Kelso without any agreement whatever with the latter. The agreement of assumption enured at once to his benefit. The subsequent agreement between Fleming and Kelso, to which Steen was a stranger, did not in any manner change the relation between Kelso and Steen. Their respective rights and obligations remained precisely the same. There is, therefore, an absence of two of the essential elements to constitute a novation: 1. A mutual agreement between all the parties to substitute a new debtor for the old debtor. 2. The extinguishment of the old debt. *Fensler v. Prather*, 43 Ind. 119; *Clark v. Billings*, 59 Ind. 508; *Bristol, etc., Co. v. Probasco*, 64 Ind. 406; *Parsons v. Tillman*, 95 Ind. 452.

The averment that the payee of the note did release the defendant is the statement of a mere conclusion of law.

What has been said concerning the answer necessarily disposes of the motion for a new trial.

The judgment is reversed, with costs.

NIBLACK, C. J., did not participate in this decision.

Filed Dec. 11, 1885.

Joyce et al. v. Dickey.

No. 11,954.

JOYCE ET AL. v. DICKEY.

104	183
189	276
104	183
167	507

APPEAL.—*Time of.*—*Dismissal.*—*Practice.*—An appeal not taken within one year from the time the case was finally disposed of on its merits will be dismissed.

From the Jefferson Circuit Court.

C. E. Walker, for appellants.

J. W. Linck, W. T. Friedley and C. A. Korbly, for appellee.

ELLIOTT, J.—The judgment from which this appeal is prosecuted was rendered in February, 1880. On the 11th day of the following December the appellants moved the court to strike out part of the original complaint then on file, in order to make it the same as a substituted complaint which had been filed by the appellee. This motion was not ruled upon until October 15th, 1883, when it was sustained. In February, 1880, the motion for a new trial was overruled, and this was followed by a judgment for the appellee. On the 15th day of October, 1884, this appeal was taken.

The appellee, in his answer to the appellants' assignment of errors and by motion to dismiss, presents the question of the right to appeal. We think that the motion to dismiss must be sustained. The case was finally disposed of upon its merits, when the motion for a new trial was overruled, and judgment entered in favor of the appellee in February, 1880, and as the appeal was not taken within a year from that time, it can not be entertained. The appeal is not from the ruling made on the motion in October, 1883, for that ruling was in favor of the appellants, but from the judgment rendered in February, 1880. The decision of the trial court upon the merits of the case was made at the date last mentioned, and not in October, 1883, when the motion of the appellants was sustained.

Appeal dismissed.

Filed Nov. 18, 1885.

Burkett et al. v. Bowen.

No. 12,266.

104 184
148 231

BURKETT ET AL. v. BOWEN.

CHANGE OF JUDGE—*Proceedings Supplementary to Execution*.—"Civil Action."

—A proceeding supplementary to execution is a civil action within the meaning of sections 412-417, R. S. 1881, providing for a change of venue or a change of judge; and it will be error in such case to overrule a proper motion for a change of judge.

From the Fulton Circuit Court.

M. R. Smith and *G. W. Holman*, for appellants.

J. Rowley and *M. A. Baker*, for appellee.

Howk, J.—This was a proceeding, by the appellee against the appellants, supplementary to execution. The controlling question in the case is, whether or not such a proceeding is a civil action within the meaning of sections 412 to 417, R. S. 1881, which authorize and provide for a change of venue or a change of judge. This question was carefully considered by this court in the recent case of *Burkett v. Holman*, *ante*, p. 6, and the conclusion was there reached that a proceeding supplementary to execution is a civil action within the meaning of the sections above cited of our civil code. Upon the authority of the case cited, this cause must be decided as that was; and we therefore hold, in the case at bar, that the trial court erred in overruling appellant's motion for a change of judge. This ruling was assigned by appellants as cause for a new trial in their motion therefor, and for this cause the motion for a new trial ought to have been sustained.

Upon the general question as to what must be considered "civil actions" within the scope and meaning of the statutes of this State, we cite also the case of *Powell v. Powell*, *ante*, p. 18.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Dec. 9, 1885.

Wright v. Tichenor.

No. 12,233.

WRIGHT v. TICHENOR.

REAL ESTATE, ACTION TO RECOVER.—*Statute of Limitations.*—*When Begins to Run.*—The statute of limitations begins to run only when the right of action accrues; and in the case of a claim to the possession of real estate, the right of action does not accrue until there is a right of entry.

SAME.—*Sale on Execution against Husband Alone.*—*Wife's Interest.*—Where land was sold in 1854 upon an execution against the husband alone, the right of the wife to enter into possession of the land did not vest until the death of her husband, and an action may be brought within twenty years from that time.

SAME.—*Interest Taken by Purchaser.*—A sale made upon a judgment rendered against the husband alone does not convey the interest of the wife, but only that of the husband.

SAME.—*Unrecorded Deed.*—In such case the fact that the husband's deed to the land was unrecorded can not deprive the wife of her rights as against a person claiming title under such sale.

SHERIFF'S SALE.—*Position of Purchaser.*—A purchaser at a sheriff's sale occupies the same position as if he had purchased the property from the debtor at the same date as that on which the judgment was rendered.

DEED.—*Quitclaim.*—*Color of Title.*—*Notice.*—*Sheriff's Sale.*—A quitclaim deed executed by one having no title, *e. g.*, by one who has previously conveyed all his interest in the land, does not convey even color of title to one who takes with notice. One who buys at a sheriff's sale made on a judgment against the first grantee will take a quitclaim deed from the grantor with notice.

From the Tipton Circuit Court.

J. M. Fippen, for appellant.

J. A. Swoveland and *J. I. Parker*, for appellee.

ELLIOTT, J.—Exhibited in a condensed form, the facts stated in the special verdict are these: The appellant became the wife of Amasa P. Casler in September, 1848, and continued to sustain that relation to him until his death, on the 13th day of December, 1864; Amasa P. Casler became the owner of the land in controversy in 1850; on the 13th day of November, 1854, executions were issued upon judgments rendered against him, the land sold, and purchased by the remote grantor of the appellee. The deed under which the

104	186
186	218
187	221
197	401
104	186
181	228
104	185
124	189
136	28
138	496
104	185
132	262

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appellant's husband claimed title was never recorded, and was executed by Robert E. Davidson and wife. Possession of the land was taken by the purchaser at the sheriff's sale, and he and his grantees have since been continuously in possession under the deed executed by the sheriff and a quitclaim deed executed by Robert E. Davidson and wife. The appellant has never conveyed her interest in the land, nor joined in any conveyance of it.

The statute of limitations does not begin to run until the right of action accrues, and in the case of a claim to the possession of real estate, the right of action does not accrue until there is a right of entry. Prior to the act of 1875 the right of a married woman to recover her interest in the lands of her husband did not accrue until his death. Where, therefore, land was sold in 1854 upon an execution against the husband alone, the right of the wife to enter into possession of the land did not vest until the death of her husband. As against the title conveyed by the sheriff's deed, the right of the appellant did not vest until the death of her husband, on the 13th day of December, 1864, and as this action was brought within twenty years from that time, the statute of limitations did not bar her right to assert title against the rights and interests conveyed by the sheriff's deed.

A sale made upon a judgment rendered against the husband alone does not convey the interest of the wife; it is the interest of the husband, and not that of the wife, that is sold. *Taylor v. Stockwell*, 66 Ind. 505, see p. 516; *Pattison v. Smith*, 93 Ind. 447; *DeArmond v. Preachers Aid Society*, 94 Ind. 59; *Mansur v. Hinkson*, 94 Ind. 395; *Richardson v. Schultz*, 98 Ind. 429. The interest of the appellant was, therefore, not sold or conveyed by the sheriff to the appellee's remote grantor. The sale by the sheriff did not profess to convey the title of the appellant, and the appellees can not have even color of title under the sheriff's deed, to the interest of the former in the land of her deceased husband. In legal effect

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he is a tenant in common with her, she owning one-third of the land and he the two-thirds of it.

The fact that the deed to the appellant's husband was unrecorded can not deprive her of her rights. *Sutton v. Jervis*, 31 Ind. 265; *Johnson v. Miller*, 47 Ind. 376 (17 Am. R. 699). In *Alexander v. Herbert*, 60 Ind. 184, it seems to have been held, without reference to our former decisions, or to any authorities, that the destruction of the deed executed to the husband extinguishes the rights of the wife as against a *bona fide* purchaser; but assuming this to be the correct rule, and granting that the earlier cases were erroneously decided, still, the rights of the appellant are not affected by the rule, for here there is no *bona fide* purchaser of her interest, and there is a claim through the husband. The title asserted upon the sheriff's deed is grounded upon the assumption that the land was the judgment debtor's, and, as such, subject to seizure and sale. The assertion of title through the sheriff's deed involves the assumption that the owner of the land was the appellant's husband, for the purchaser at a sheriff's sale necessarily asserts that the judgment debtor owned the property sold upon the judgment. In so far, therefore, as the appellee asserts title upon the sheriff's sale, he claims title through the same person through whom the appellant claims, and in doing so asserts title in that person. *Wilson v. Peelle*, 78 Ind. 384; *Bennett v. Gaddis*, 79 Ind. 347; *Stockwell v. State, ex rel.*, 101 Ind. 1. As the parties both claim through the same source, the appellee, in so far as the right grounded on the sheriff's sale is concerned, can not successfully claim to be a *bona fide* purchaser, ignorant of the rights of the wife. He is, it is obvious, in a very different position from one who does not claim through the husband.

A purchaser at a sheriff's sale occupies substantially the same position as if he had purchased the property from the debtor at the same date as that on which the judgment was rendered. *Orth v. Jennings*, 8 Blackf. 420; *Doe v. Hall*, 2 Ind. 556. The purchaser gets all the interest in the land

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that the debtor had at the time the judgment was rendered, but he gets nothing more. *Foltz v. Wert*, 103 Ind. 404. In this case, the purchaser at the sheriff's sale obtained the interest of the husband, but not of the wife, and the latter's interest is not, as against such a purchaser, affected by the fact that the deed was not recorded, for the purchaser affirms, as does the wife, that the judgment debtor did have title.

The remaining question is as to the effect of the quitclaim deed executed by Robert E. Davidson and wife to one of the remote grantors of the appellee. The verdict is not very satisfactory upon this point, but enough appears to show that it was executed after Davidson and wife had executed the deed to the appellant's husband, and after the purchaser at the sheriff's sale had taken possession under the deed executed by the sheriff. As this quitclaim deed was executed after the execution of the deed to the appellant's husband, it was executed by grantors who had no title. In our opinion such a deed does not convey even color of title in such a case as the present. We expressly limit our decision upon this point to the case before us, for if the grantee in that deed had bought without notice of Amasa P. Casler's title, an essentially different case would have been presented, but he did not buy without notice. On the contrary, he bought the land at the sheriff's sale as the land of Casler. He, therefore, not only had notice of Casler's title, but that was the title which he bought. The land was sold as Casler's, and as his was bought. The purchaser at sheriff's sale bid for Casler's interest, and that was the interest which he purchased. The title under which the appellee's grantor entered into possession, therefore, comes from the same source as that asserted by the appellant, and the relation occupied by the parties is substantially that of tenants in common; hence the appellee can not assail the common source of title, nor by a release and quitclaim from the grantor of that title destroy his cotenant's title. *Elston v. Piggott*, 94 Ind. 14, see p. 26; *Phelan v. Kelley*, 25 Wend. 389; *Braintree v. Battles*, 6 Vt. 395;

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Funk v. Newcomer, 10 Md. 301; *Burhans v. Van Zandt*, 7 Barb. 91; *Rothwell v. Dewees*, 2 Black, 613; *Keller v. Auble*, 58 Pa. St. 410. Any other rule would work great injustice, for the wife of the judgment debtor has a right to presume that possession once taken under the sheriff's deed continues to be held under that deed, and to permit the purchaser to secure a quitclaim deed from her husband's grantor and assert that against her would put her at a great disadvantage, since she has no opportunities of knowing that there is any change in the character of the possession in the title under which it is held. She is not bound to watch, day by day, to see whether some change is made in the character of the possession, or some new claim of title asserted.

The question here is not what would be the effect of a deed actually conveying a new title, for, as the facts appear in the verdict, the quitclaim deed conveyed no title, because the grantor had before conveyed the land to the appellee's husband. We need not and do not decide what the rule would be if the grantor in a quitclaim deed to a purchaser at a sheriff's sale of the husband's interest had title to convey.

The record is in a confused state, as it appears that judgment was rendered notwithstanding the verdict, and we think that justice will best be done by remanding the case with instructions to award a *venire de novo*.

Judgment reversed.

Filed Dec. 10, 1885.

No. 11,217.

ROWLEY, ADMINISTRATOR, v. FAIR.

TOWNSHIP TRUSTEE.—Title to Money of Township.—Administrator.—The title of a township trustee in the money for which he is held accountable is a legal title only in a technical and limited sense, the money really belonging to the township; and upon his death while in office the same limited title is transmitted to his administrator.

104	189
128	645
104	189
145	509
145	611
104	189
149	548

Rowley, Administrator, v. Fair.

SAME.—Payment by Administrator of Deceased Trustee to Latter's Successor.—

*Conversion.—Identification.—*It is the duty of the administrator of a deceased township trustee to deliver over such money, so far as the same can be identified, to the successor of such trustee; but when the money has been so far converted by the trustee as to render its identification as the property of the township impracticable, no such duty exists, except in the payment of an allowance regularly made against the estate.

From the DeKalb Circuit Court.

W. L. Penfield, P. V. Hoffman and D. D. Moody, for appellant.

I. Stratton and W. H. Dills, for appellee.

NIBLACK, C. J.—This was an action by James D. Rowley, administrator of the estate of James Quince, deceased, unadministered, against David W. Fair, for the alleged conversion to his own use of a certain bank certificate of deposit and other evidences of indebtedness claimed to have been the property of the estate. Some questions were reserved upon the pleadings, but the special finding of the facts made by the circuit court, and the conclusions of law drawn therefrom, fairly present all the questions really involved in this appeal.

The facts as they were specially found were, in effect, as follows: That prior and up to the 15th day of August, 1882, the decedent, James Quince, was trustee of Butler township, in DeKalb county, in this State, and that, on that day, while holding said office, he died intestate; that his widow, Lorena Quince, was thereupon, on the 22d day of August, 1882, appointed administratrix of the estate of the decedent, and, after duly qualifying, entered upon her duties as such administratrix; that, on the 21st day of August, 1882, the defendant, Fair, was appointed trustee of the said township of Butler, and immediately took upon himself the duties of the office, as the successor of the decedent; that at the time of the death of the said James Quince, he had on deposit at the banking house of John L. Davis, at Auburn, in this State, sums of money as follows: One hundred and seventy dollars

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as a balance due on a running account, subject to his check and standing to his credit in his individual name, and eight hundred dollars, payable to him individually on demand, for which he held a certificate of deposit, dated June 17th, 1882; that all of the money thus on deposit, and standing to the individual credit of the decedent in said banking house, was money which he, as such trustee, had received from the treasurer of DeKalb county, and which, consequently, belonged to the said township of Butler; that the decedent, at the time of his death, was also the holder of certain promissory notes payable to him individually, as follows: Two notes against one Wesley I. Work, one for forty dollars, and the other for twenty-eight dollars; one note against one William McKinley for thirty dollars, upon which some interest was due; one note against one Milford Clark on which the sum of twenty-three dollars was then due; three notes against one Perry Fitch, one for one hundred and thirty dollars, another for one hundred dollars, and the remaining one for forty dollars, all with some interest also due upon them; that all of said notes, except the one against Milford Clark, were given to the decedent for money belonging to said township of Butler, as was respectively known to each of the makers thereof at the time such notes were executed and the money was obtained upon them; that the certificate of deposit and notes above named came into the hands of Lorena Quince upon her appointment as the administratrix of the estate of the decedent; that upon demand made of her by the defendant, she surrendered said certificate and notes to him as the trustee of the said township of Butler, each acting in good faith, and believing it was the duty of the said Lorena to so surrender the same as the property of such township; that the estate of the decedent is insolvent; that the said Lorena had resigned her trust as the administratrix of said estate, and the plaintiff had been appointed as her successor in the administration of the same; that when the decedent died there was in his hands as the trustee of the township in question the

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sum of \$1,765; that after applying the certificate of deposit and notes turned over by Mrs. Quince to the defendant in extinguishment of the amount due from the decedent to the township, there still remained a balance due from the decedent's estate to the township; that no claim had been made on behalf of the estate of the decedent to the money and notes turned over to the defendant by Mrs. Quince until after the former had, in good faith, applied the same to the use of the township; that the total amount which would have been due at the time of the trial on all the notes, except the Clark note, turned over as above stated to the defendant, was \$431, which was additional to the sum of \$800 and the balance of \$170 respectively on deposit in the banking house of John L. Davis, and which were also transferred to the defendant.

From these facts the circuit court deduced the following conclusions of law:

First. That the plaintiff was entitled to a judgment against the defendant for \$23, the amount of the Clark note transferred to the latter by Mrs. Quince.

Second. That as to all the other notes and sums of money in controversy, judgment ought to be entered in favor of the defendant.

Third. That the plaintiff was entitled to a judgment for costs.

The plaintiff excepted to the second conclusion of law deduced as above, whereupon judgment was rendered in his favor for only the sum of \$23 and costs, and this appeal is prosecuted upon the alleged ground that upon the facts found by the circuit court the plaintiff was and still is entitled to judgment for the full amount of all the money and notes transferred to the defendant by Mrs. Quince, as herein above set forth.

It is true, as counsel remind us, that this court has several times decided that a township trustee, in common with a county treasurer, is more than a mere bailee of the money which comes into his hands by virtue of his office; that as

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to all such money, he becomes, in a general sense, a debtor to the State, for the use of those directly interested, for the money which thus comes into his hands, and is required to account for such money irrespective of any casualty by which the same or any part of it may be lost; that by reason of this greater responsibility than a mere bailee, such a trustee becomes technically invested with the legal title to the money paid over to him from time to time for the use of his township, and hence responsible upon his official bond for the loss of any of such money while it remains in his hands, upon the theory that it is his, and not the township's, money which is lost. *Halbert v. State, ex rel.*, 22 Ind. 125; *Morbeck v. State, ex rel.*, 28 Ind. 86; *Rock v. Stinger*, 36 Ind. 346; *Inglis v. State, ex rel.*, 61 Ind. 212; *Linville v. Leininger*, 72 Ind. 491; *Mount v. State, ex rel.*, 90 Ind. 29 (46 Am. R. 192); *Rogers v. State, ex rel.*, 99 Ind. 218.

But the title of a township trustee in the money for which he is held accountable is only recognized to the extent that is necessary for the better preservation of the various funds which the money represents, and is, in fact, a legal title only in a technical and very limited sense. The equitable title to, and the beneficiary interest in, such money is in the township, and in that view the money for which the trustee is liable upon his bond really belongs to the township. In that sense, section 5993, R. S. 1881, refers to all moneys coming into the hands of a township trustee, as belonging to the township. That section authorizes a township trustee "To receive all moneys belonging to the township, and pay the same out according to law, as right and justice shall require," and also requires him "To see to a proper application of all moneys belonging to the township for road, school, or other purposes." Section 5999, R. S. 1881, enacts that "Such trustee shall, at the expiration of his term, deliver to his successor all moneys, books, and papers belonging to his township." In case of the death of a township trustee while

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in office, the same technical and limited title which he held to the money remaining in his hands is transmitted to his administrator. But in connection with such a transmission of title is coupled the duty of delivering over such money, so far as the same can be identified, to the successor of such trustee. The duty of the administrator in respect to delivering over the money remaining unexpended, and the books and papers belonging to the township, to the proper successor, is analogous to that which would have devolved upon the deceased trustee if he had lived until the expiration of his term. When, however, the money received by the deceased trustee has been so far converted by him in his lifetime as to render its identification as the property of the township impracticable, the administrator is not required, and ought not to be permitted, to deliver over to the successor of such trustee money which may have been derived from other sources, to make good the money so converted, except in payment of an allowance regularly made against the estate.

Notwithstanding the technical legal title which a township trustee takes in money received by him in his official capacity, it is his duty not only to preserve the existence, as well as the identity of each particular fund under his control, but to hold the money so received in some suitable way ready to meet all proper demands which may arise against any one of such funds, or to be conveniently delivered to his successor, either upon his death or the expiration of his term. This is a rule of general application in the execution of all trusts, whether public or private. *State, ex rel., v. Sanders*, 62 Ind. 562.

The circuit court having found that the money and all the notes, except the Clark note, delivered over to the defendant, were the property of the township of which the defendant was at the time the trustee, it necessarily follows that there was no error in holding that the plaintiff was only entitled to a

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judgment against the defendant for the amount of the Clark note. *Nixon v. State, ex rel.*, 96 Ind. 111.

As to what would constitute embezzlement by a township trustee, under the provisions of section 1951, R. S. 1881, is a question not now, in any manner, before us, and concerning which we are not now called upon either to intimate or to decide anything.

The judgment is affirmed with costs.

Filed Dec. 15, 1885.

No. 11,966.

READ v. YEAGER, AUDITOR, ET AL.

TAXES.—*Repair of Free Turnpikes.*—*City of Evansville.*—*Exemption in Charter from Road Tax.*—Clause 39 of section 30 of the city charter of Evansville (Local L. 1847, p. 3), which provides that no property within said city shall be taxed for the purpose of making or repairing any road outside the city limits, gives an exemption only from the ordinary road tax, and not from a tax levied for the purpose of keeping free turnpikes in repair, as the latter class of roads was not contemplated at the time of the enactment of such charter.

From the Vanderburgh Superior Court.

J. E. Williamson, for appellant.

W. F. Smith, for appellees.

Howk, J.—In this case the only question for our decision may be thus stated: Did the court below err in sustaining the separate demurrers of the appellees to the appellant's complaint, for the want of sufficient facts therein to constitute a cause of action?

In his complaint the appellant, Read, alleged that appellee Yeager was the auditor of Vanderburgh county, and the appellees Barker, Bauer and Mesker were the board of commissioners and *ex officio* turnpike directors of the free turnpikes of said county, of which turnpikes there were claimed

104	196
145	249
104	196
159	185
104	196
162	686

Read v. Yeager, Auditor, et al.

to be seventy miles, more or less, in such county, which turnpikes had been wholly constructed along and upon the ordinary State and county highways of the county by the county board during the last six years; that the county board, without authority of law, entered upon said highways and gravelled the same, and paid therefor out of the county treasury, without any part of the costs against any property along any of such highways; that there was not a single gravel road or turnpike in said county that had not been so made, and wholly paid for out of the ordinary public funds of the county, in cash, upon warrants drawn upon the county treasury in the ordinary way by the county auditor; that no vote of the taxpayers, or any other act of any person or persons, was ever had or done, by virtue of which the county commissioners entered upon and gravelled the aforesaid highways; that the county commissioners never claimed to act by authority of any law, but well knew, during the gravelling of such highways, that their acts were unauthorized by law and void; that their proceedings, in gravelling highways and paying therefor as aforesaid, became so burdensome to the taxpayers of the county that such commissioners were finally enjoined from proceeding further in that behalf, at the suit of such taxpayers, and had since desisted from imposing any further taxes in that behalf.

And the appellant further alleged that he resided within the corporate limits of the city of Evansville, and owned property, real and personal, within such city, but did not own any property outside of such city limits; that all of his property was subject to municipal taxation, and to taxation for ordinary State and county purposes; that the appellees had combined and confederated together for the purpose of imposing illegally a tax of \$30,000 upon the taxpayers of the county, and the appellee Yeager, as county auditor, had entered in the order-book of the board of county commissioners a certain false and illegal entry, a true copy of which was therewith filed as a part thereof; and the appellant charged

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that the appellees Barker, Bauer and Mesker, by virtue of their offices as directors of the free turnpikes of the county, never at any time made any certificate of any kind, on or before or subsequent to the first Monday in June, 1883, to the appellee Yeager, as such auditor, or otherwise, showing "the amount of money necessary for the purpose of keeping such free gravel roads in repair;" that, assuming it to be a fact that the aforesaid highways were free turnpike roads within the meaning of the statute concerning the same, the appellant charged that the county board, *ex officio* directors of such free turnpikes, wholly failed and neglected to make the certificate required by section 5104, R. S. 1881; that appellee Yeager, acting by virtue of such illegal and false entry, was proceeding to make a levy upon all the property of all the taxpayers of the county, and was then engaged in extending upon the tax duplicate of the county the aforesaid sum of \$30,000, and the other appellees were aiding him in so doing.

And the appellant averred that the appellees would, if not restrained by the order of the court, proceed with their illegal acts as aforesaid, and assess against him, as well as against all other taxpayers of the county, a certain portion of the aforesaid \$30,000, upon the tax duplicate of the county; and that, should this be done, a lien would thereby appear to be created against appellant's real estate to the extent of the tax so charged against him, which would be a cloud upon the title to all his real estate, and greatly and irreparably injure him in its use and enjoyment. Appellant averred that the aforesaid highways were not such free turnpike roads as are contemplated by the statute, and that the appellees had no authority to impose any tax, as they were seeking to do, for the purpose of keeping the same in repair, upon any property whatever; that if such highways did fall within the meaning of such statute, the directors having failed to make the certificate required by such section 5104, all action by the auditor in levying a tax for the purpose of repairs was utterly

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void; that, at all events, the property of residents, situate within the corporate limits of the city of Evansville, was not subject to taxation for the purpose of keeping such roads in repair; that there was no tax due from appellant to the county of Vanderburgh, or the State of Indiana, for any purpose whatever; and that, if such assessment be made, appellant would suffer great and irreparable loss and damage, which he was powerless to prevent, unless the court would enjoin the appellees from making such levy and extending such assessment upon the tax duplicate. Wherefore, etc.

The certificate mentioned in appellant's complaint, whereof a copy was therewith filed, was in the words and figures following, to wit:

"Room of Board of Turnpike Directors, Evansville, Ind., June 2d, 1883.

"A certificate required by section 1 of an act entitled 'An act to provide for the repair of free turnpike roads in the various counties of Indiana, and constituting the board of commissioners of any county in this State a board of directors of such roads,' approved March 24th, 1879, being section 5104, R. S. 1881, as such section is amended by an act approved March 6th, 1883.

"Now comes the board of turnpike directors of Vanderburgh county, and, after having duly deliberated as to the amount of money necessary for the purpose of keeping the free turnpike roads of said county in repair, now here find, declare and determine that the sum of thirty thousand dollars will be so required; and the board of turnpike directors, in compliance with the statute, in such case made and provided, and with said section 1 of the act of March 24th, 1879, and of said act as amended April 13th, 1881, and March 6th, 1883, do now hereby certify to Charles F. Yeager, auditor of Vanderburgh county, that the sum of thirty thousand dollars will be and is necessary for the purpose of keeping the free turnpike roads of said county in good repair."

The city of Evansville is incorporated as such city under

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an act of the General Assembly of this State, entitled "An act granting to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter," approved January 27th, 1847. Local Laws of 1847, p. 3. Appellant alleged in his complaint that he resided within the corporate limits of such city of Evansville, and that all his property real and personal, for the purposes of taxation, was located and had its situs within such city limits. In discussing the sufficiency of his complaint, it is first insisted on behalf of appellant by his counsel, "that, under the charter of the city of Evansville, no property within its limits can be taxed for road purposes." This contention is founded on the *thirty-ninth* clause or paragraph of section 30 of the law under which the city of Evansville is incorporated, wherein it is provided that "no person residing in said city shall be compelled or required to work on any road without the city, nor shall any property lying or being within the city be taxed for the purpose of making, opening, improving, or repairing any road * * * without the limits of said city."

When the charter of the city of Evansville was enacted and became a law, nearly forty years ago, the fundamental law of this State was the Constitution of 1816. It may be conceded that, under that Constitution, the exemption of property within such city from taxation for the purpose of making, opening, improving or repairing roads, without the limits of such city, as provided in its charter, is constitutional and valid legislation. It is manifest, however, from the provision we have quoted from the 39th clause of section 30 of such city charter, that the exemption from taxation therein provided for is an exemption only from the ordinary road tax, which the township trustee, with the concurrence of the board of commissioners of his county, under section 5066 now in force, is authorized to assess, and which has been authorized by previous legislation for more than thirty years. Exemptions from taxation are not and ought not to be especially favored by the courts; on the contrary,

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they are to be strictly construed. *Common Council, etc., v. McLean*, 8 Ind. 328; *Trustees, etc., v. Ellis*, 38 Ind. 3; *Conklin v. Town of Cambridge City*, 58 Ind. 130; *City of South Bend v. University, etc.*, 69 Ind. 344; *State, ex rel., v. City of Indianapolis*, 69 Ind. 375 (35 Am. R. 223); *Warner v. Curran*, 75 Ind. 309.

Within the last ten years the Legislature has provided for the construction of free turnpikes, and has fostered and encouraged their construction and repair by wise and liberal legislation. This class of roads, free turnpikes, was unknown in this State, and was not contemplated by the General Assembly, we think, when, in 1847, the law was enacted which constitutes the charter of the city of Evansville. We can not extend, by construction, the exemption from taxation above quoted, in the 39th clause of section 30 of such city charter, so as to include therein free turnpikes, a class of roads not then contemplated. In *City of South Bend v. University, etc., supra*, the court said: "Exemption from taxation, however, should be strictly construed, and restricted rather than enlarged." In section 5105, R. S. 1881, it is provided in effect that the tax, for the purpose of keeping free turnpikes in good repair, shall be levied "upon all taxable property of the county." Taxable property of the appellant, within the city of Evansville, is certainly taxable property of Vanderburgh county. Notwithstanding the exemption from taxation for outside roads, of property within the city of Evansville, contained in its charter, we are of opinion that appellant's property, within such city, is lawfully subject to taxation for the repair of free turnpikes, without the city limits.

This is the controlling question in the case in hand, although some other points are discussed by counsel on both sides. It is not necessary that we should hold, and we do not hold, that the 39th clause of section 30 of the charter of the city of Evansville is repealed by any later legislation. Nor do we decide in this case, that the clause of the charter un-

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der consideration is not repealed by later laws; but, on this point, we cite *Eichels v. Evansville St. R. W. Co.*, 78 Ind. 261 (41 Am. R. 566), and authorities there cited. We simply decide here and now, that the exemption of city property from taxation for outside roads, as provided in such city charter, can not be so extended by construction as to exempt such property, also, from taxation for the repair of outside free turnpikes, a class of roads not contemplated at the time of the enactment of such city charter. It is said that the certificate of the board of directors of free turnpikes of Vanderburgh county, whereof a copy is filed with and made part of the complaint, is "illegal and false." This charge is merely the pleader's conclusion from facts which are not apparent and are not stated; and, in such case, it is a mistake to say that the demurrer admits the truth of the charge. A demurrer admits the truth of facts when well pleaded, but does not admit the truth of adjectives or epithets. What facts rendered such certificate illegal are nowhere stated, nor is it shown wherein the certificate was false.

The court committed no error, as it seems to us, in sustaining appellees' demurrers to the appellant's complaint.

The judgment is affirmed, with costs.

Filed Dec. 15, 1885.

No. 12,423.

GAVIN v. THE BOARD OF COMMISSIONERS OF WELLS
COUNTY ET AL.

COUNTY COMMISSIONERS.—*Powers*.—The board of commissioners possesses only statutory powers, and can do no act not expressly or impliedly authorized by statute.

SAME.—*Jurisdiction*.—*Notice*.—Notice is a jurisdictional matter; where there is no notice there is no jurisdiction, and if no jurisdiction the proceedings of the board are void.

104	201
126	555
104	201
180	518
104	201
137	362
139	634
104	201
142	19
143	517
104	201
146	167
147	508
104	201
148	474
152	325
104	201
108	23

Gavin v. The Board of Commissioners of Wells County *et al.*

SAME.—Injunction.—Where an order of the board of commissioners is void, for want of jurisdiction, injunction will lie.

SAME.—Free Gravel Road.—Additional Tax.—Final Order.—Where, in a proceeding to establish a free gravel road, the board of commissioners has confirmed the report making assessments, and made a final order therein that the tax be placed upon the duplicate, and the gravel road has been fully completed and accepted, the power of such board in that proceeding is at an end, and a subsequent levy of an additional tax, made by the board without notice, is void.

From the Wells Circuit Court.

N. Burwell, for appellant.

J. S. Dailey, L. Mock, T. W. Wilson and J. J. Todd, for appellees.

ELLIOTT, J.—The first paragraph of the appellant's complaint describes land of which he is the owner, and alleges that taxes to the amount of \$476.50 were assessed against it to aid in the construction of a free gravel road; that these taxes were made payable in six annual instalments; that the order for the assessment of the taxes was made on the 9th day of September, 1882, and that he has paid all of the instalments that have become due, and is willing to pay those not due when they become payable.

It is further alleged that the board caused the taxes so assessed to be entered upon the tax duplicate on that day, and that, "on the 6th day of June, 1884, long after the gravel road was completed and taken off the hands of the contractor, the board of commissioners attempted to levy on the plaintiff, without any notice to him, or any notice whatever, an additional burden by ordering a levy of eight per cent. on the original assessment amounting to the sum of \$38.12, additional tax for the year 1884." It is charged in the complaint that "the order of the board making the eight per cent. additional tax levy was unauthorized by any law of this State." The trial court sustained a demurrer to this paragraph of the complaint, and this ruling is assigned for error.

The contention of the appellant's counsel is, that the levy

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of the additional tax was not authorized by law and is void. We have been unable to find any statute which authorizes the board of commissioners, after it has once levied a tax to aid in the construction of a free gravel road, to add to the assessment after the tax has been placed upon the duplicate and after the gravel road has been fully completed, and we know of no general rule of law that will sustain such a proceeding. The statute provides that "The final action of the commissioners shall be entered upon their records, together with the report as confirmed, showing how the said estimated expense has been apportioned upon the land ordered to be assessed as aforesaid. The county auditor, before placing the said assessment upon the duplicate, shall reduce or add to the same, *pro rata*, the amount the actual expense shall be found to be, more or less than the said assessment." R. S. 1881, section 5096.

The clear implication from this provision is, that when the commissioners confirm the report and direct that the tax be placed upon the duplicate, their powers in that proceeding are exhausted. The language of the provision clearly imports that the matter is then terminated, for the words employed are "the final action of the commissioners," and the character of the acts performed by the board shows that the whole matter, so far as taxpayers who do not complain are concerned, is finally disposed of, by the action taken by the board upon what the statute denominates the "final report." There is nothing in any other part of the statute that conflicts with the provision quoted. It is true that in section 5095 there is the following provision: "If, at any time after making such final order, the commissioners shall find that there has been an omission of lots or lands within the territory sought to be assessed, or that there has been manifest injustice in the apportionment of taxes, or that public necessity requires any alteration in the manner of improvement as ordered, they are authorized to make such addition and re-apportionment as they may deem proper." This provision, it is evident, does

not authorize the board of commissioners to assess a new and different tax, and that is really what was done in this instance. It does authorize the commissioners to correct errors in a tax levied pursuant to notice and under the proceedings had under the original notice.

The board of commissioners possesses only statutory powers, and can not do any act not expressly or impliedly authorized by statute. This is a general rule, and it applies with peculiar force to such a case as the present, for this is a case where the board exercises a special power in a special case. More than this, the proceeding is one which takes from a private owner money for the benefit of the public, and the case belongs to the class of cases where the officers claiming the right to impose a tax for a special purpose must show clear statutory authority. The statutory authority terminated in this instance with the assessment of the tax, and there is no authority to levy without notice a new and distinct assessment. A power to effectuate a special purpose is not a continuing one, but is exhausted when once completely exercised.

A board of commissioners empowered to order a tax for a special purpose can not, after the power has been exercised, resume it. Where a board makes a final order, it can not at pleasure take up the matter and make other orders. *Doctor v. Hartman*, 74 Ind. 221, and cases cited; *City of Madison v. Smith*, 83 Ind. 502, *vide* p. 512; *Weir v. State, ex rel.*, 96 Ind. 311, *vide* p. 313; *Board, etc., v. Logansport, etc., G. R. Co.*, 88 Ind. 199.

There is a broad distinction between general and special powers. The former are in their nature continuing ones, the latter are not. *Platter v. Board, etc.*, 103 Ind. 360. The accomplishment of the special purpose for which a power was granted terminates the power. If it were otherwise parties could never know when the matter was at an end. In such a case as this, the taxpayer has a right to treat the matter as finally determined when the final order is made, for, if it were otherwise, he would be required to keep watch over the proceedings of the

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board for years, and such a requirement would be palpably unreasonable and essentially unjust. If the rule were not what we assert it to be, then at any time after the final order the commissioners might resume power and increase the tax much beyond the original assessment. There would, indeed, be no limitation upon their authority.

In the case of *Strosser v. City of Fort Wayne*, 100 Ind. 443, we said: "The right to notice is a fundamental one, and it is a rule of wide application, that in order to take from a citizen any rights, or impose upon him any burdens, notice of some kind must be given him. *Wright v. Wilson*, 95 Ind. 408; *Campbell v. Dwiggins*, 83 Ind. 473; *Tyler v. State*, 83 Ind. 563; *Cooley Const. Lim.* (5th ed.) 615." This doctrine applies here. The appellant was entitled to notice, and the notice given extended no further than the final order in the matter in which it was given. A party notified to appear in a stated proceeding is not bound by anything done after a final judgment has fully disposed of that proceeding. Without notice, a new assessment can not be made two years after the final order is entered. The functions of the original notice ended with the final order which it authorized. If a new assessment can be made in two years, then there is no reason why it may not be made in five, ten, or twenty years. If it can be made for a small sum it can be made for a large one; and this proves the unreasonableness of the position assumed by the appellees.

Notice is a jurisdictional matter; where there is no notice there is no jurisdiction, and if no jurisdiction, then the proceedings are void. *Strosser v. City of Fort Wayne, supra*; *Town of Cicero v. Williamson*, 91 Ind. 541; *Jones v. Cardwell*, 98 Ind. 331, *vide* p. 332. If there is no notice the judgments of the courts of the highest rank are not valid, and surely those of an inferior court can not be. There was no notice of the assessment of the second tax, and the order of the commissioners was therefore without force.

The case before us is not one where there was some notice,

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although defective, nor is it a case where there was merely error or irregularity in the proceedings of the board, but it is a case where there was a total lack of jurisdiction for the reason that there was no notice. *Hobbs v. Board, etc.*, 103 Ind. 575. The case is, therefore, not within the rule that a judgment can not be collaterally impeached, and the cases of *Stoddard v. Johnson*, 75 Ind. 20, *Ricketts v. Spraker*, 77 Ind. 371, *Cauldwell v. Curry*, 93 Ind. 363, *Smith v. Clifford*, 99 Ind. 113, and their kindred cases, are not in point.

The rule has long been established, and is maintained by many decisions, that where an order of the board of commissioners is void, because made in a case where it had no jurisdiction, injunction will lie. This is such a case.

The court erred in sustaining the demurrer to the first paragraph of the complaint.

The second paragraph of the complaint alleges that the tax levied by the board of commissioners was more than sufficient to pay the bonds issued to secure funds to pay the cost of constructing the road; it does not, however, aver that the tax was sufficient to pay the cost of constructing the road and all expenses. The statute is careful to protect the county interests and to guard against the use of the general funds of the county to pay any part of the expenses incident to the construction of a free gravel road, for it provides "That all the lands liable to assessment, under the provisions of this act, for the construction of such road, shall be held responsible to the county, to protect the county against all loss or liability arising from any judicial proceeding affecting the assessments for benefits, and also all costs and expenses that may arise in any litigation; and re-assessments may be made to discharge the same." R. S. 1881, sec. 5102.

This statute is broad enough to authorize the board to make an assessment sufficient to cover all expenses, direct and incidental, and the second paragraph of the complaint would be bad if it stopped with the averment of the fact that the cost of constructing the road did not exceed the assess-

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ment, but it does not stop with the averment of this fact, for it does contain, in addition, substantially the same facts as the first paragraph. For the reasons given in considering the first paragraph, we think the second is also good. In thus holding we do not decide that the board may not make a subsequent levy if the first proves insufficient, but we do decide, that where there has been a final order, and the gravel road is fully completed and accepted, a new or additional tax to aid in the construction of the road can not be assessed without notice. Notice is the foundation of the right to make either an original or a new special assessment.

Counsel for the appellant is in error in asserting that it is not alleged that the tax duplicate is in the hands of the treasurer.

Judgment reversed.

Filed Dec. 12, 1885.

104	207
124	61
104	207
148	94

No. 12,125.

GOSS ET AL. v. BOWEN.

TENDER.—Promissory Note.—Attorney's Fees.—Answer.—To a complaint on a promissory note an answer to so much of it as seeks to enforce a stipulation for attorney's fees, averring a tender of the principal and interest due on the note, but failing to state the amount due at the date of the tender, and that the sum tendered was in lawful money, and not showing that such sum had been brought into court for the plaintiff, is bad on demurrer.

ATTORNEY'S FEES.—To What Extent Contract for is Enforceable.—Promissory Note.—The stipulation for the payment of attorney's fees becomes operative and can be enforced only when expenses have been actually and necessarily incurred in the employment of an attorney for the enforcement of collection, consequent upon the failure of the payor to keep his engagement, and then only to the extent actually paid or to be paid, or reasonably chargeable.

From the Fulton Circuit Court.

Goss *et al.* v. Bowen.

M. R. Smith and E. P. Ferris, for appellants.

J. Rowley and M. A. Baker, for appellee.

MITCHELL, C. J.—To a complaint on a promissory note, the defendants answered to so much of it as sought to enforce a stipulation allowing 10 per cent. attorney's fees for collection, in substance, that both before and after the maturity of the note they had tendered to the plaintiff the amount of the principal and interest due thereon; that the plaintiff declined to receive it, and requested them to retain the money; that on the day on which the note fell due, one of the defendants made inquiry at the plaintiff's house for him, and received information that he had gone to the State of Ohio, to be absent several days; that he then informed the plaintiff's attorney that he desired to pay the note, and was informed by him that no suit would be brought on it; that at and always since its maturity, the defendants, as the plaintiff well knew, were and had been ready and willing to pay the full amount of the note and interest; that after the offer to pay, and the refusal of the plaintiff to receive payment, he placed the note in the hands of his attorney for suit, for the sole purpose of compelling the defendants to pay the 10 per cent. attorney's fees stipulated therein.

A demurrer was sustained to this answer, and this ruling presents the only question in the record.

Admitting the facts properly pleaded in the answer to be true, as the demurrer does, it is a matter of regret that the defence against the claim for attorney's fees was not made in such manner that the court could have afforded the defendants the relief to which in good conscience they otherwise would have been entitled.

That the suit was brought not for the purpose of enforcing payment of the debt evidenced by the note, but to compel payment of the stipulated attorney's fee, is admitted. That the defendants, after the note matured and before suit brought, tendered to the plaintiff the amount of principal and interest

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due thereon, although not pleaded with sufficient precision to constitute a good plea of tender, is doubtless true.

If a lawful tender had been pleaded, and the amount tendered had been brought into court, so as to have kept it good, we doubt not the court below would have held the answer sufficient. But as the answer failed to state the amount of principal and interest due on the note at the date of the tender, and that the amount was tendered in lawful money, and as it did not appear from the answer that the defendants had paid the amount tendered into court for the plaintiff, the demurrer to the answer was properly sustained. *Hazelett v. Butler University*, 84 Ind. 230; *Smith v. Felton*, 85 Ind. 223; *Eichholtz v. Taylor*, 88 Ind. 38.

It may be proper to add that as contracts for the payment of attorney's fees are only upheld upon the ground that they are a reasonable indemnity against loss actually and necessarily occasioned by the failure of the payor, it follows that where expenses are unnecessarily, or where none are actually, incurred, the contract can not be enforced. *Kennedy v. Richardson*, 70 Ind. 524; *Billingsley v. Dean*, 11 Ind. 331.

The stipulation for the payment of attorney's fees only becomes operative when expenses have been actually and necessarily incurred in the employment of an attorney for the enforcement of collection, consequent upon the failure of the payor to keep his engagement, and then only to the extent of the expense actually paid or to be paid, or reasonably chargeable.

Judgment affirmed, with costs.

Filed Oct. 10, 1885; petition for a rehearing overruled Dec. 12, 1885.

104 210
148 574
148 576
148 577

No. 12,080.

CAMPBELL ET UX. v. HUNT.

NEW TRIAL AS OF RIGHT.—*Action to Recover Real Estate.*—*Leasehold Interest.*—A leasehold for a term of years is such a “valid subsisting interest in real property” under section 1050, R. S. 1881, as entitles the lessee, in an action to recover possession, to a new trial as of right under section 1064, R. S. 1881.

EVIDENCE.—*Partnership.*—*Lease of Land for Particular Business.*—*Rents.*—*Action to Recover Real Estate.*—Where, upon the formation of a partnership to conduct the business of grape culture, one partner, in furtherance of the business, takes a lease for a term of fifty years to a part of the land to be used in such business and owned by the other, and then, upon a dissolution, by agreement a portion of the vineyard is set apart to the lessee in severalty, without any limitation as to its use, the latter may, in an action by him subsequently brought to recover its possession, prove its rental value for general purposes, and evidence offered by the defendant as to its rental value for grape culture only, is not admissible.

PRACTICE.—*When Error in Excluding Evidence Cured by Withdrawing Objection to Admission.*—Where evidence is excluded on objection, but immediately thereafter the objection is withdrawn to the only part of it which is material, the error, if any, is cured, although the party offering the evidence declines to avail himself of the concession.

FORMER ADJUDICATION.—*Judgment on Demurrer.*—Where a case is disposed of on judgment upon demurrer to an answer, and not upon its merits, it does not constitute a former adjudication. It is only where the matter in issue has been either actually or presumptively determined, that the judgment is a bar to another action.

REAL ESTATE, ACTION TO RECOVER.—*Action upon Claim in Fee Simple not Bar to Action under Lease.*—The commencement of an action upon a claim of title in fee simple does not estop the plaintiff from subsequently bringing an action for the same land on a claim under a lease.

From the Lake Circuit Court.

E. D. Crumpacker, A. D. Bartholomew and H. A. Gillett,
for appellants.

W. Johnston, for appellee.

NIBLACK, J.—Charles G. Finney, being the owner of a tract of land in Porter county, in this State, on the 24th day of April, 1866, entered into partnership with one Nathaniel

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R. Strong in planting a vineyard and in the culture and sale of grapes, and to that end executed, in conjunction with Strong, an agreement in writing, by which he, amongst other things, leased and demised to him, the said Strong, part of such tract of land to be planted with grapes, for the term of fifty years. A few years afterwards Finney died testate, having devised the tract of land in question to his widow, Elizabeth Finney. Thereafter, on the 27th day of March, 1874, the said widow and Strong, acting seemingly upon the theory that the partnership for the culture and sale of grapes had been dissolved, mutually executed an agreement making partition of the leasehold estate in the vineyard between them. Under this agreement, about ten acres of ground was set off to Strong separately, without any limitation or restriction as to the use which might, or should be made of it. On the 25th day of November, 1875, Strong sold, and by quit-claim deed conveyed, this piece of ground to Franklin W. Hunt. Elizabeth Finney, the widow, having in the meantime intermarried with one Samuel A. Campbell, took, through him, possession of the land so sold and conveyed to Hunt, in the year 1880, and has since continued in possession. Hunt, claiming to be the owner in fee simple of the land thus set off to Strong and so conveyed to him, commenced an action against Mrs. Campbell and her husband, in the Porter Circuit Court, to recover the possession of it.

Mrs. Campbell and her said husband answered, setting up the facts herein above recited *in extenso*, and inferentially averring that Hunt had surrendered his interest in the lease under which he held the land.

Hunt demurred to the answer, but his demurrer was overruled and, declining to plead further, final judgment was entered against him upon demurrer. Upon an appeal to this court, that judgment was affirmed. See *Hunt v. Campbell*, 83 Ind. 48. Hunt thereupon commenced this action in the Porter Circuit Court, against Mrs. Campbell and her said husband, to recover the possession of the same land, averring

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that he was the "owner and entitled to the possession for a term of years, to wit, fifty years from the 24th day of April, 1866," of the land in controversy. A trial resulted in a verdict and judgment for the defendants.

After this judgment was entered, the plaintiff moved for a new trial as a matter of right, under section 1064, R. S. 1881, tendering at the same time a satisfactory bond for the payment of all costs and damages, as required by that section of the statute, and over the objection and exception of the defendants, the judgment was set aside and a new trial granted. The venue was then changed to the Lake Circuit Court, where there was a trial by the court, a finding for the plaintiff, a denial of a new trial, and a judgment against the defendants upon the findings, from which this appeal is prosecuted.

Error is first assigned upon the decision of the Porter Circuit Court granting the plaintiff a new trial as a matter of right.

Section 1050, R. S. 1881, enacts that "Any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein."

Section 1064, herein above referred to, having reference to judgments rendered in actions prosecuted under the foregoing section, provides that "The court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, his heirs, assigns, or representatives, and on the applicant giving an undertaking, with surety to be approved by the court or clerk, that he will pay all costs and damages which shall be recovered against him in the action, shall vacate the judgment and grant a new trial."

The point made against the order of the Porter Circuit Court, vacating the judgment and granting a new trial, is, that the term of years, counted upon by the complaint, did not

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constitute "a valid subsisting interest in real property" within the meaning of section 1050, set out as above, and that hence the action was one in which the plaintiff was not entitled as a matter of right to demand a new trial. This claim is based upon the theory that a leasehold interest in land is personal property, and descends to the administrator, and not to the heir, citing *Smith v. Dodds*, 35 Ind. 452, and *Cunningham v. Bazley*, 96 Ind. 367, and that, in consequence, the action was for the recovery of personal, and not real, property.

It is true that a lessee's interest in land descends to his administrator, and not to his heirs, but it is, for that reason, none the less a valid and subsisting interest in real property. The fact that the administrator must prosecute an action for the recovery of the lessee's interest, after his death, instead of his heirs, does not change the essential character of the proceeding. It is nevertheless an action, in the nature of an action of ejectment, to recover an actual interest in real property.

An action of ejectment, when resorted to, is prosecuted upon the theory that a lessee has been disturbed in the possession of the lands in controversy, and the inevitable inference from existing statutes and decided cases is, that an action like this may be prosecuted under section 1050, *supra*, upon the same theory. The right to possession conferred by a lease is as effectual to support an action under that section as if conferred by title in fee simple. It follows that the Porter Circuit Court did not err in vacating the judgment and granting a new trial. *Butler University v. Conard*, 94 Ind. 353.

Error is next assigned upon the refusal of the Lake Circuit Court to grant a new trial for certain specifically assigned causes.

With a view of establishing the amount of damages which the plaintiff had sustained by being kept out of possession, several witnesses were examined as to the rental value of the land in dispute for general purposes. The defendants objected unavailingly to the introduction of this evidence, upon the

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ground that by the terms of the lease the use of the land was restricted to the culture of grapes alone. The defendants then offered to prove that during the time they had been in possession the rental value of the land for the cultivation of grapes did not exceed ten cents an acre, a sum much below that named by other witnesses for general purposes, but the court refused to permit the proposed proof to be made.

It was clearly the intention of the parties to the lease, that the ground covered by it should be used only in the cultivation of grapes, and it is equally clear that the lease was executed as a means of promoting the business of a partnership which the parties had in view at the time of its execution. A dissolution of that partnership was consequently a practical abandonment of the object for which the lease was executed. When, therefore, the widow and devisee of Finney, the lessor, and Strong entered into a new agreement making partition of the vineyard and setting apart to the latter a portion of it in severalty, without any limitation or restriction as to its use, or the purposes to which it might be applied, Strong stood discharged from any obligation to cultivate the part so set off to him in grapes, as contemplated by the lease. For further particulars as to the lease, as well as the agreement for partition, see the opinion in the case of *Hunt v. Campbell*, 83 Ind. 48, already referred to.

The defendants also offered to prove by Samuel A. Campbell that, for a year or two before they took possession, the plaintiff was accustomed to assert and give out that he was the owner in fee simple of the land in suit, and that Mrs. Campbell had no right to the same; that Campbell finally told the plaintiff that he and Mrs. Campbell were going to take possession of the land at any rate; that the plaintiff replied that they might do so, and that he would then test the question of his right to a fee simple estate in the land. But, upon the objection of the plaintiff, the evidence thus proposed was excluded. The plaintiff, however, immediately thereafter withdrew his objection to so much of the proposed

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evidence as had relation to the defendants taking possession of the land, but the defendants declined to avail themselves of this partial concession, and offered no further evidence as to any part of the alleged conversation. That part of the evidence offered to which the objection was withdrawn was all that could, in any event, have been material to the defendants, as the case then stood before the court. Hence, conceding that what was proposed was as a whole erroneously excluded, the error was cured by the withdrawal of the objection to so much as had reference to the circumstances under which the defendants went into possession. There is, therefore, no question before us as to the materiality of this excluded evidence.

The defendants then offered in evidence a transcript of the proceedings and judgment, together with the opinion of this court, in the first action between the same parties, begun and determined in the Porter Circuit Court as herein above stated, and it was also excluded. It is argued that this transcript was competent evidence: *First*. As tending to prove that the plaintiff had surrendered all claim to the land under the lease. *Secondly*. To establish a former adjudication of the question of title to the same land as between the same parties.

We see no error in the exclusion of the transcript in question. The plaintiff having failed in, and practically abandoned, his action because his demurrer to the answer to his complaint was overruled, he was left in substantially the same position he occupied before the action was commenced. The case was not disposed of upon its merits, but upon a question of pleading preliminary to a hearing upon the merits. The judgment upon demurrer, therefore, involved no question of the surrender of any claim of title under the lease, or of former adjudication.* It is only where the matter in issue has been either actually or presumptively determined, that the judgment is a bar to another action. *Winship v. Winship*, 43 Ind. 291; *McSweeney v. Carney*, 72 Ind. 430; *Reed v. Higgins*, 86 Ind. 143.

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Nor was the commencement of the first action upon a claim of title in fee simple an election which estopped the plaintiff from setting up a claim under the lease. That was not, as the present case is not, an action on the lease. It was an action simply for the recovery of land upon a claim of ownership, in which it may have been expected that the lease would be used as evidence. It has been frequently held that the deed, under which a party claims title, is not the foundation of an action to recover the land conveyed by it. Such a deed affords evidence of title when the title is put in issue, but nothing more. *Sedgwick v. Tucker*, 90 Ind. 271. The same rule applies to a lease where the action is to recover possession for a term of years, and the lease is merely to be used in evidence, as in the case at bar.

It is argued, finally, that the evidence did not show the defendants to be *unlawfully* in possession of the land, and that hence the finding was not sustained by sufficient evidence. The evidence made a good *prima facie* case in favor of the plaintiff's right of possession, and nothing was shown in defence to the contrary. The inference, therefore, necessarily was that the defendants were *unlawfully* in possession.

We have thus disposed of all the complaints made of the proceedings at the last trial, and find no error in the refusal of the Lake Circuit Court to grant a new trial.

The judgment is affirmed, with costs.

Filed Oct. 6, 1885.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The appellants complain that in the opinion heretofore filed in this case, we erred in holding that by the agreement of partition entered into between Mrs. Campbell and Strong, the latter was discharged from any obligation to cultivate the land set off to him in grapes. But the argument employed in support of that complaint would, if permitted to prevail, lead to the conclusion that the land set off to Mrs. Campbell under the same agreement could only in like man-

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ner be cultivated in grapes during the period covered by the original lease, and, as we are not prepared to place such a construction upon the agreement in question, we feel constrained to adhere to the construction of that agreement heretofore given by us.

The appellants next complain that we were wrong in holding that the circuit court did not err in refusing to confine the inquiry as to the rental value of the land in controversy to its value for cultivation in grapes. Accepting our construction of the agreement of partition as correct, as we continue to do, there was necessarily no error in that ruling of the circuit court.

It is further complained that our holding, in effect that the circuit court did not err in excluding certain proof proposed to be made by the appellant Samuel A. Campbell, is not well supported by the facts, as they are made to fully appear by the bill of exceptions in the record.

This case is in many of its features *sui generis*. In the first place, the original agreement entered into between Finney and Strong was a very unusual agreement, hard to classify or to construe, and, as the sequel has proven, an unfortunate one for Finney's estate. In the next place, the agreement for partition made between Mrs. Campbell and Strong was seemingly a very generous and unrestrictive arrangement on the part of the former. No rent, or other equivalent, was reserved for the use of the land set apart to Strong. He was only required to pay the accruing taxes upon the land so long as he occupied it. The land was apparently and presumably set off to Strong for a consideration which had already moved either to Mrs. Campbell or to Finney, her then late husband. Construing, therefore, the original agreement, and the agreement making partition, together, the reasonable inference seems to be inevitable that Strong became, through those agreements, vested with a greater and more indefeasible interest in the land assigned to him than is ordinarily acquired under a lease containing mutual and dependent stipulations

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and covenants. We consequently regard the authorities cited by counsel in support of their position as inapplicable to the peculiar facts of this case, and, for a similar reason, are of the opinion that the matters proposed to be proved by Campbell were not material to any question then before the circuit court.

The petition for a rehearing is overruled.

Filed Dec. 16, 1885.

No. 10,515.

BROWN ET AL. v. SEARLE ET AL.

PRACTICE.—*Judgment Non Obstante Verdicto.*—Under the civil code of this State, a motion for judgment *non obstante verdicto*, or for judgment on the pleadings, can only be made by the party against whom the verdict has been found. Section 566, R. S. 1881.

SAME.—*Defects in Pleading Supplied by Evidence.*—*Supreme Court.*—*Presumption.*—Where the defects in a pleading are of a character which could be supplied by the evidence and cured by the verdict, the Supreme Court will presume, in the absence of the evidence from the record, that such defects were so supplied and cured.

SAME.—*Special Finding.*—*General Verdict.*—If the special findings are not inconsistent with the general verdict, the latter will stand.

From the Cass Circuit Court.

D. D. Dykeman and *M. Winfield*, for appellants.

S. T. McConnell, *R. Magee* and *D. B. McConnell*, for appellees.

Howk, J.—In this case, the appellants Brown and Brown sued the appellees Searle and Rice, in a complaint of five paragraphs, each of which counted upon a separate and distinct promissory note. The five notes were each dated March 22d, 1880, were each in the sum of \$291.67, were all executed by the appellees, and were payable respectively in five, six, seven, eight and nine months after date to the appellants,

by their partnership name of John Brown & Son. In each paragraph of complaint it was alleged as to the note therein sued upon, that it was past due and wholly unpaid. Afterwards, and pending the suit, the appellants filed a supplemental and sixth paragraph of complaint, counting upon another promissory note of the same date and amount as each of the notes previously sued upon, executed also by the appellees and payable to appellants, by their said partnership name, ten months after its date, which note last in suit, it was alleged in such supplemental and sixth paragraph, did not mature until after the commencement of this action, and was then due and unpaid. Each of the appellees answered separately, in two paragraphs, of which the first was a general denial and the second paragraph stated a special defence. Appellants replied to the second paragraph of the separate answer of appellee Searle, in three paragraphs, of which the first was a general denial, and each of the other two paragraphs stated special matters in reply. Appellants also replied to the second paragraph of the separate answer of appellee Rice, in two paragraphs, whereof the first was a general denial, and the second was a special reply.

The issues joined were tried by a jury and a general verdict was returned for the appellants, the plaintiffs below, assessing their damages in the sum of \$831.80, and their attorneys' fees in the sum of \$190.90. With their general verdict, the jury also returned into court their special findings upon particular questions of fact, submitted to them by the appellants under the direction of the court, in substance as follows:

1. What is the amount of the principal and interest of the notes sued upon, less the credit of \$15 endorsed upon one of them? Answer. \$1,633.13.
2. What is the amount of attorneys' fees as proved? Ans. \$190.90.
3. Did the defendant Searle, with Melville Castle, within a few months after he came into the possession of the stock

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of goods, examine such stock for the purpose of ascertaining what changes had been made in the cost marks, and what goods had been invoiced to him by the plaintiffs too high under the contract? Ans. Yes.

4. If you answer question No. 3 in the affirmative, did defendant Searle make memoranda of all the changes he could discover, and of such other goods as, he believed, were invoiced too high? Ans. No.

5. What was the amount of the difference between the invoice as upon the goods and the invoice as should be upon the goods, as shown by such memoranda? Ans. \$321.25.

6. Were all the goods, named and designated in such memoranda, changed as shown by such memoranda after the contract was signed? If not, state what was the change in these goods in amount? Ans. Yes.

7. Have the defendants proved that any other changes were made, after the contract was signed, than as found in answer to question No. 6? If you answer yes, state upon what goods these changes were made? Ans. No.

8. Were there any changes made in the marks upon the goods of the 3d class after the contract was signed? If you answer in the affirmative, state the amount of such change? Ans. \$344.37.

9. Were there any other changes made in the marks upon the goods of the 1st class, except to restore the original cost marks of the goods to the plaintiffs, in cases where the original cost marks had been changed or lost? Ans. Yes.

10. What was the amount of the changes made in the goods of the 1st class? Ans. \$786.33.

11. What amount do you find in favor of the defendants, upon the second paragraph of answer and set-off of Frank W. Searle? Ans. \$1,131.20.

12. Do you find in favor of the defendants, upon the second paragraph of answer and set-off of the defendant Rice? If you answer in the affirmative, state the amount? Ans. \$1,131.20.

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Over the appellant's motions for judgment in their favor, for the amount of principal, interest and attorneys' fees of the notes in suit, upon the special findings of the jury notwithstanding their general verdict for a less amount, and their four several motions for judgment *non obstante veredicto* for the full amount of principal, interest and attorneys' fees of the notes sued upon, the court rendered judgment in their favor on the general verdict for the damages therein assessed and the costs of suit.

The plaintiffs have appealed to this court, and have here assigned a large number of errors. Among others, they have assigned as errors the overruling of their demurrers to the second paragraphs of the separate answers of the appellees. Upon a former hearing of this appeal we held that these errors were well assigned, and reversed the judgment below for these erroneous rulings. But the plaintiffs were not content with this reversal, and asked for and obtained a rehearing upon the express and only ground that, under the practice of this court, they had waived the errors assigned upon those rulings by their failure to discuss them in their briefs of this cause. Since the rehearing was granted, the plaintiffs have filed new and additional briefs herein, but they still fail and omit to discuss the errors assigned by them, upon the overruling of their demurrers to the second paragraphs of the separate answers of the appellees. These errors, therefore, under our practice, must be regarded as practically and impliedly, if not expressly, waived and withdrawn from our consideration.

It is manifest from what we have said, that the appellants do not ask or desire us to reverse the judgment below upon the ground that the second paragraphs of appellees' separate answers were bad on the demurrers thereto, and that errors were committed in overruling such demurrers. But it does not follow that they, or their learned counsel, are here consenting to the sufficiency of these paragraphs of answer to withstand their demurrers. On the contrary, they are asking

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us to go much further than we would be required to go in order to hold such paragraphs of answer bad on their demurrers thereto. They ask us to hold that the paragraphs were so utterly and hopelessly insufficient that, after trial and with all the intendments of the verdict in their support, they constituted no defence whatever to appellants' action; and that, therefore, errors were committed by the court below in overruling each and all of their several motions for judgment in their favor for the full amount of principal, interest and attorneys' fees of the notes in suit, upon the pleadings in the cause, *non obstante veredicto*.

We are of opinion, however, that this motion was not well taken by the appellants, in whose favor the jury found both in their general verdict and in their special findings of fact. It was a common law motion, and, perhaps, under that law it might have been made by the party in whose favor the verdict was returned, though there are respectable authorities which seem to hold otherwise. However this may have been at common law, it is certain, we think, that since our first civil code of practice took effect, on May 6th, 1853, a motion for judgment *non obstante veredicto*, or for judgment on the pleadings, could only be made by the party against whom the verdict has been found. In section 372 of that code, which section was substantially re-enacted in 1881, and is now in force as section 566, R. S. 1881, it was and is provided: "When, upon the statements in the pleadings, one party is by law entitled to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." *Freitag v. Burke*, 45 Ind. 38; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Dorman v. State*, 56 Ind. 454; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86 (33 Am. R. 76).

But if we were to hold that the party in whose favor the verdict has been found might move for judgment *non obstante veredicto*, or any other judgment than a judgment on such verdict, we still could not hold that the trial court erred in

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the case in hand in overruling any of the appellants' several motions for judgment *non obstante veredicto*. There are no defects in either of the appellees' answers which could not have been supplied by the evidence on the trial and cured by the verdict. The evidence on the trial is not in the record of this cause, and, in its absence, we are bound to presume, in support of the rulings below, that the supposed defects in appellees' answers were fully supplied by such evidence and cured by the verdict.

There is no inconsistency between the general verdict of the jury and their special findings of fact. Of course, in such case, the special findings of the jury can not control the general verdict, and judgment must be rendered on the latter. This is settled by many decisions of this court. *Baltimore, etc., R. R. Co. v. Rowan, ante*, p. 88, and cases cited.

We find no error in the record.

The judgment is affirmed, with costs.

Filed Dec. 16, 1885.

No. 12,234.

WRIGHT v. KLEYLA.

REAL ESTATE, ACTION TO RECOVER.—*Sale on Judgment against Husband Alone.—Separate Deed of Wife to Purchaser.—Color of Title.—Statute of Limitations.—Disability of Coverture.*—In 1854 certain land belonging to C. was levied upon and sold to satisfy a judgment against him alone. In 1856, his wife executed a deed, in which he did not join, to one claiming under the sheriff's sale. In 1864, C. died, his wife surviving. Action by the latter, in 1884, against a remote grantee to recover one-third of the land.

Held, that while her deed was void, it was sufficient to convey color of title.

Held, also, that the plaintiff's cause of action to avoid the deed which gave color of title accrued when her grantee took possession under the deed in 1856, as there was then an adverse possession of all the land.

Held, also, that the defendant and his grantors having been in possession

104	228
197	202
104	228
130	5
104	228
134	247
134	535
136	24

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more than twenty years under color of title conferred by the plaintiff's deed, the action is barred by the statute of limitations, the plaintiff's disability of coverture not postponing the time when the statute began to run.

From the Tipton Circuit Court.

J. M. Fippen, for appellant.

J. N. Waugh, J. P. Kemp and G. H. Gifford, for appellee.

ELLIOTT, J.—The facts stated in the special verdict are substantially these: In 1848, the appellant became the wife of Amasa P. Casler and continued to occupy that relation until his death in December, 1864. The land in controversy was conveyed to the appellant's husband in June, 1852, and in November, 1854, was levied upon and sold to satisfy a judgment against him. In March, 1856, a deed was executed to one of the remote grantors of the appellee by the appellant, but in this deed her husband did not join.

The deed of the appellant executed in March, 1856, was not effectual to convey title; it was, however, sufficient to convey color of title to the land described, for the grantor was not a stranger, but had some interest to convey. A void deed will convey color of title. *Bell v. Longworth*, 6 Ind. 273; *Vancleave v. Milliken*, 13 Ind. 105; *Doe v. Hearick*, 14 Ind. 242; *Bauman v. Grubbs*, 26 Ind. 419; *Brenner v. Quick*, 88 Ind. 546, see p. 552.

The appellee and his grantors have, therefore, been in possession under color of title since March, 1856, and as this action was not brought until April, 1884, it is barred by the twenty years' statute, unless the fact that the appellant was under the disability of coverture until December, 1864, postponed the time when the statute began to run until that date. Our opinion is that the disability of the appellant did not postpone the time when the statute began to run.

The statute of limitations runs against all persons, whether under disability or not, unless they are excepted from its operation. Angell Lim., sections 476, 485.

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A recent author says: "The statute of limitations begins to run against a party immediately upon the accrual of a right of action, unless at that time he was under some of the disabilities named in the statute; and a saving or exception not found in the statute will not be implied." Wood Lim. 495. This doctrine was explicitly announced in *Strong v. Makeever*, 102 Ind. 578, see opinion on petition for a rehearing. A like doctrine has been announced in other cases. *Breeding v. Shinn*, 8 Ind. 125; *Vancleave v. Milliken*, *supra*; *Frantz v. Harrow*, 13 Ind. 507; *Vail v. Halton*, 14 Ind. 344; *Gray v. Stiver*, 24 Ind. 174; *White v. Clawson*, 79 Ind. 188; *Wright v. Wright*, 97 Ind. 444.

Our statute makes no exceptions; it is general in its terms and operates upon all persons. It does, however, make special provision for persons under legal disability, but not by excepting them from its operation. The special provision which it makes is this: "Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed." The effect of this provision is, not to change the time when the statute begins to run, in cases of persons under disability, but to allow them two years after the disability has been removed in which to bring an action. The provision proceeds upon the theory that the statute runs from the time the cause of action accrues, and, proceeding on this theory, grants two years' time after the removal of the disability, although the full time may have expired. It does not grant twenty years to an infant after he becomes of age, nor does it grant that period to a married woman after the removal of the disability of coverture, but it does grant to persons under disability two years after the removal of their disability, although the statute may have been running for full twenty years. On the other hand, it does not cut down the twenty years, for, if the period of twenty years from the time the cause of action accrued has not expired, the party is entitled to the whole of the unex-

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pired time in which to bring his action. To illustrate: Suppose ten years to have expired at the time of the removal of the disability, then the party would have the unexpired period of ten years in which to sue; but, if the full twenty years had expired, then two years after the removal of the disability would be all that would be allowed the party. It is only in cases where the period of twenty years has fully expired, or where twenty years would not carry the time two years beyond the removal of the disability, that the provision we have quoted has any practical effect. If the disability continues for much more than twenty years, the party is still entitled to the two years after its removal; but, if it is removed two years before the expiration of the twenty years, then twenty years from the time the cause of action accrued is the full period allowed the party. 1 Works Pr., sec. 271, and cases cited; *Harris v. Rice*, 66 Ind. 267.

It is quite clear that the Legislature enacted the provision we have quoted upon the theory that the statute begins to run from the time the cause of action accrues, for, upon any other theory, the provision is utterly meaningless. If it be true that the statute does not begin to run until the removal of the disability, then the limitation would be twenty years from that time, and the provision under immediate mention would be without the slightest force, and we should be compelled to disregard it. But the rule is that no clause of a statute shall be disregarded if it is possible to give it effect. There is, however, not the slightest difficulty in giving full effect to the provision, for it is consistent with the theory of the law and in harmony with all of the provisions of the statute of which it forms a part. In that statute it has a place, and courts have no right to render it ineffective; nor could they do it without producing confusion and discord, where there is now a clear and harmonious system. The theory which gives consistency to the system and full effect to the law is, that the statute begins to run from the time the cause of action accrues, but until two years after the disability is removed

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its bar is not complete, no matter how long the disability may continue.

The right of action to avoid the deed which gave color of title accrued when the appellee's grantor took possession under the deed executed by the appellant in 1856. There was then an assertion of title to the entire estate, and this was such a denial of the right of the appellant as created a cause of action. Where one tenant in common asserts possession under a deed professing to convey the entire estate, he will be deemed to have ousted his co-tenant. *Nelson v. Davis*, 35 Ind. 474.

The action was not brought within two years after the removal of the disability of the appellant, nor within twenty years after the right accrued, and it can not be maintained.

It is unnecessary to examine the sufficiency of the first paragraph of the answer, for the record clearly shows that the judgment does not rest on that paragraph. It has been many times held that where the record affirmatively shows that the judgment is not upon a bad paragraph, and is on a good one, an error in overruling a demurrer to the bad paragraph is harmless.

Judgment affirmed.

Filed Dec. 11, 1885.

No. 12,352.

BRYAN v. LYON ET AL.

HABEAS CORPUS.—*Petition by Father for Custody of Children.*—*Welfare of Children Governing Consideration.*—Under section 2513, R. S. 1881, in a *habeas corpus* proceeding by a father for the custody of minor children, the custody should, all else being equal, be awarded to the father; but such section does not overthrow the general rule that, even as between the father and others, the welfare of the children is the governing consideration.

SAME.—*Rights of Guardian.*—The fact that one has been appointed guar-

104	227
139	373
104	227
145	582
104	227
148	388
104	227
157	7
157	8
104	227
158	633
104	227
165	406

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dian of minor children, but without the knowledge or consent of their father, is not conclusive against the latter's right to their custody, if he is a suitable person.

SAME.—Divorce.—Decree Awarding Custody of Children to Mother is not Perpetual Bar to Father's Rights.—Upon the death of a mother to whom, in a proceeding for divorce, the custody of the children was awarded, on the ground that the father was not a suitable person to have their care, the latter may, on a satisfactory showing of fitness, secure their custody, as the judgment is not a perpetual bar to such right.

SAME.—Sufficiency of Return and Evidence.—For a return to the writ of *habeas corpus* held sufficient on exceptions, and for evidence considered and held sufficient to justify the trial court in not awarding the custody of children to their father, see opinion.

From the Vanderburgh Superior Court.

S. B. Vance, for appellant.

J. M. Shackelford and *A. L. Doss*, for appellees.

ZOLLARS, J.—By a proceeding of *habeas corpus*, appellant seeks to recover the custody of his two children; one of whom, a little boy ten years old, is in the custody of appellee Lyon, and the other, a little girl eight years old, is in the custody of appellee Ferguson. He filed a separate complaint against each of the appellees. The cases were put at issue, and, by the agreement of the parties, tried together and come here, practically, as one case. He alleged in his complaint, that on the 2d day of April, 1874, he and Sallie R. Lyon, who is now dead, were married; that the two children were born of that marriage, and that appellees wrongfully have and retain them in their custody.

A writ was awarded, and appellees jointly and separately made returns thereto. For the purposes of this decision we need only set out the separate return by Lyon. It is as follows:

"The defendant John C. Lyon amends his return to the writ herein, and for amendment says that he has the child George V. Bryan, mentioned in said writ, present in the court room; that it is as the statutory guardian, and also as the uncle of said child, George V. Bryan, this respondent has the lawful and rightful custody of said child.

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"He says that said John Bryan, because of the facts hereinafter set forth, is not entitled to, nor ought he to have the custody of said child; that from the time of the birth of said child, the said John Bryan virtually abandoned the child and its mother. The facts are these: That on the 3d day of April, 1874, said John Bryan married Sarah Lyon, who was the sister of this respondent; that there were two children born to the marriage, namely, the said George V. Bryan, who is now about ten years of age, and Sarah Ella Bryan, aged about eight years; that thereafter, to wit, on the 14th day of January, 1878, said Sarah Bryan, who had been a good, true and faithful wife, was compelled to and did, for the reasons set forth in her petition, bring a suit against said John Bryan in the superior court of Vanderburgh county, Indiana, for a divorce from the said John Bryan; that, among other things she alleged as the grounds for a divorce, were the following: That said John Bryan had, during the three years and a half past, wholly failed, refused and neglected to furnish or provide the necessaries of life for herself and children; that said John Bryan was wholly unfit and unsuitable to be entrusted with the care and custody of said children, owing to his utter worthlessness and failure to provide for his said family; that she had, since the birth of her children, herself provided for them and furnished both her children and herself with the necessaries of life.

"To that petition the said John Bryan, though duly and legally summoned by the sheriff of the county, the summons being served upon him personally for more than ten days before the first day of the term at which said cause was set down for trial, made default, and thereby admitted the truth of all the allegations in said petition contained; that on the 5th day of February, 1878, the said cause came on for trial, and said Sarah Bryan made proof of the truth of all the allegations in her said petition to the satisfaction of the court, and thereupon the court rendered its decree, granting to said

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Sarah Bryan a divorce from the said John Bryan, and also made an unconditional and absolute decree of the care, custody, education and guardianship of said two children, George V. Bryan and Sarah Ella Bryan, to the mother, Sarah Bryan, and giving judgment against said John Bryan for the costs therein, which amounted to seven dollars, and which, at the time of his obtaining the writ herein, remained wholly unpaid. That his sister, Sarah Bryan, after obtaining said divorce and the custody of her two children, continued by her efforts, she being a teacher in the public schools, to support and maintain herself and her two children until the 29th day of August, 1884, when she lost her life in the steamboat disaster on the Ohio river, between Evansville, Indiana, and Henderson, Kentucky; that it was her often expressed wish that in case of her death the said John Bryan should not have the custody of her two children, nor either of them, but she wished them to remain in the custody of her own relations.

“Your respondent further shows, that at the time said Sarah Bryan lost her life, the said John Bryan was, and had been for several years previous, and he is now a non-resident of the State of Indiana; that he had abandoned said children; that he had married another woman, by whom he had one child, now living with its mother’s relatives, the mother being dead; that on the 3d day of October, 1884, this respondent was, by the circuit court of Vanderburgh county, Indiana, the same county in which said children lived and in which they owned some personal property, duly and legally appointed the guardian of the persons and property of both of said children. He files herewith, as part hereof, his letters of guardianship. He further says he has the child, George V. Bryan, living with him, at his residence, in the city of Evansville, Indiana, as a member of his own family; that the respondent and his wife are both attached to said child, and the child is also attached to them; that he and his wife are able and fitted to rear and educate said child, and

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that they will do so, treating the child as they do their own children; that the child, Sarah Ella Bryan, is at the home of James R. Ferguson and his wife, Ella Ferguson, who was a sister of the deceased mother, and the aunt of the child; that Ferguson and his wife are competent, able and well fitted to have the custody of said child, Sarah Ella; that they have taken her as a member of their own family, and they will rear and educate her as one of their own children; that the child is greatly attached to them, and she is decidedly opposed to going into the custody of said John Bryan. He further says that said John Bryan is now a widower; that he has no home of his own; that he is a travelling salesman; that if he were given custody of said children he would take them out of the State of Indiana and place them at the house of his father, who is also a widower, with two sisters of the said Bryan, who are utter strangers to said children; that said John Bryan is comparatively a young man yet; that he has already been married twice, and there is a strong probability that he will marry another woman; that both of said children are now comfortably and happily situated; that they are both unwilling to go with said John Bryan, and leave behind them their mother's relations, who are now, and will continue to care for and educate them; that said John Bryan has no right in either law or morals to the custody of said children, or either of them."

Appellant excepted to each return, upon the ground that they and each of them are insufficient. His exceptions were overruled, and he excepted. That ruling is one of the grounds upon which he asks a reversal of the judgment.

His counsel rests his argument, in the main, upon section 2518, R. S. 1881: "Every guardian * * * shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust: *Provided*, That the father of such minor (or if there be no father, the mother, if suitable per-

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sons respectively) shall have the custody of the person and the control of the education of such minor."

The contention is that under this statute the father is entitled to the custody of his children, as against appellees, unless shown to be an unsuitable person; that the burden is upon them to show that fact, and that they have not shown it in the return made to the writ. Without deciding whether or not, in his petition or complaint, the father must allege that he is a suitable person to have the custody of his children, or whether or not those claiming the custody against him must allege and show that he is not a suitable person, we think that the return states such facts upon that subject as justified the court in refusing to strike down the return and in putting the parties to the proof. It is charged in the return that appellant ought not to have the custody of the children, because, from the time of their birth, he had virtually abandoned them and their mother; that she instituted a suit for divorce in 1878, when the younger child was very young, alleging in her complaint such abandonment and failure to provide the necessities of life for her and the children, and that on account of his utter worthlessness, he was unfit to have the custody of the children. It is further alleged in the return, that after proper notice, appellant, by his default, allowed those charges to go as confessed, and allowed the custody to be awarded to the mother; that from that time, in February, 1878, until the mother's death, in August, 1884, she supported the children by teaching school, without any aid or care from appellant; that in the meantime he had married another woman, by whom he had one child, now living with its mother's relatives, she being dead; that he has no home of his own; that he is a travelling salesman; that if given the custody of the children he will take them out of the State, and place them with his two sisters, who are utter strangers to them and live with their father in Missouri, who is also a widower.

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These several statements in the return, in connection with the other statements therein, that the children are now comfortably situated with their mother's relatives, and being well cared for and educated, are, as we have before stated, sufficient to justify the court in refusing to strike down the return, and in holding the case for a hearing. Under the above statute, all else being equal, the custody of minor children should be awarded to the father.

It was not the purpose of the statute, nor does it overthrow the general rule, well settled in this court and by the authorities elsewhere, that in a controversy for the custody of minor children, even as between the father and others, the future welfare and interests of the children will determine to whose care the custody should be committed. The right of the father or mother to the custody of the children will, in all cases, be fully considered, and be given due and full weight, but that naked right alone is secondary to the welfare of the child. *Jones v. Darnall*, 103 Ind. 569, and cases there cited; *Joab v. Sheets*, 99 Ind. 328; Church Habeas Corpus, section 442; Schouler Dom. Rel., section 248; Hurd Habeas Corpus, 461.

This rule is recognized by the above statute, which makes the right of the parent dependent upon the condition that the parent shall be a suitable person to have the custody, care and training of the child.

The cases cited by appellant, when properly considered, are not in conflict with the above cases and authorities.

In the case of *State, ex rel., v. Banks*, 25 Ind. 495, there was a contest between the father and the grandfather of the child. The case was ruled upon the statement in the bill of exceptions that the father and grandfather were each proper persons to have the care, custody, and education of the child. It was held, therefore, that the custody of the child should be awarded to the father.

In the decision of the case, moreover, the court recognized the existence of the rule that the welfare and interests of

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the child are the important things to be considered, and that its custody will not be awarded to the father unless he is a suitable person to have its care and training.

This will suffice upon this branch of the case until we come to consider the evidence.

The fact that Lyon was appointed guardian of the persons and property of the children, is not of itself conclusive against appellant's right to their custody, if he is a suitable person. In the appointment of the guardian, appellant was in no way a party, nor had he notice of the application for letters of guardianship, so far as shown by the returns to the writ.

It is argued by counsel for appellees, that the judgment of the court in the divorce case, awarding the custody of the children to the mother, was and is conclusive against any claim by appellant for such custody, notwithstanding the facts that the mother is dead, and that this controversy is between the father and other parties. We need not here intimate an opinion as to how much weight that argument might be entitled to were the mother alive, and this controversy were between her and appellant. However that might be, we are well satisfied that the judgment in the divorce case did not, and could not, forever cut off and bar appellant's right to the custody of his children. By reason of his neglect at the time, and prior to the divorce case, and, perhaps, for other reasons, he might have been an unsuitable person at that time to have the care and custody of the children; and especially might that have been so, as between him and the mother, the children being then quite young, and in need of a mother's care. It does not follow, however, that because he was at that time thus adjudged not entitled to the custody of the children, as against the claim of the mother, that adjudication shall be a perpetual adjudication of his unfitness, under all and changed circumstances, to have the custody of his children. The mother is dead. Her right to the custody of the children descended to no one. The status of the children, as fixed by the decree and judgment in the divorce

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case, has been destroyed by the death of the mother and custodian. Upon her death, no one had the right to the custody of the children, unless appellant, by reason of being their father and as such bound to maintain them, might claim that custody. It might well be that his circumstances have materially changed since the judgment in the divorce case, and that he has changed with them. From a negligent, neglectful, and unfeeling father, that he may then have been, it might well be that he has become in every way a fit and suitable person to have the custody, care, and training of his children.

If, indeed, such changes in him should be shown to have occurred, we know of no reason why he might not, as against all others, the mother being dead, assert and maintain his parental right to the custody of his children, notwithstanding that in a case between him and the mother of the children, she was adjudged to be the more suitable to have their custody and care. It might well be that changed circumstances have made it eminently proper that he, of all others, is the proper person to have the training of his children. Changed circumstances might well be such that it would be a wrong to the children to deprive them of the fostering care of him who, above all others, would love and cherish them. Whether or not there have been such changes, it will be necessary for us to determine when we come to examine the evidence. We are cited by appellee's counsel to the case of *Wilkinson v. Deming*, 80 Ill. 342. In that case, it appears that in a divorce proceeding between a husband and wife, the wife was granted a divorce and awarded the custody of the child. After the death of the mother the father commenced a proceeding in *habeas corpus* against the testamentary guardian of the child to recover its custody. In passing upon the relative rights of the parties upon appeal, the Supreme Court said that a decree of divorce being granted on the fault of the father, and giving the custody of the child absolutely to the mother, takes away, *ipso facto*, all control of the father over

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the child; that it nullifies, or at least neutralizes, the rule of the common law, and takes from the father all power thereafter over the infant until it shall be restored by the action of a proper court; that by the decree the infant is no longer the child of the divorced father, but is entirely under the control of the mother. This language must be limited to the case before the court, and in doing that, it must be remembered that the wife and mother, as she had a right to do under a statute then in force in that State, had, by will, appointed a guardian for the child, with the full right to its custody. Under the decree in the divorce case, the mother had the absolute custody of the child. Under the statute, she had the right by will to transfer that custody to another. Thus the right of custody continued with the mother while she lived, and by her will passed at once, upon her death, to the person named in her will. We have no such statute in this State, and hence what was said in that case is not authority here.

Appellant filed what is denominated a reply to appellees' returns to the writ.

Upon the issues made by the complaint, the returns to the writ and the so-called reply, the case was tried. Appellant read a number of depositions by persons in Louisville, where he was engaged for some years, and in St. Louis, where he now resides, all of which tend to show that he is a man of good habits and good character, a competent business man, more especially as a travelling salesman, and that he is now engaged with his father and others in business in St. Louis.

By the cross-examinations of his witnesses, it is shown that he lives with his father and two sisters in St. Louis; that he makes business trips away, averaging about one per month, and that he is absent on these trips usually three and four days, and occasionally as long as thirty days. It is also shown by the cross-examination, that after the divorce from the children's mother, he married another woman, who is now dead, and that the child born of this marriage is with its mother's relatives.

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To meet the case attempted to be made by appellant, appellees, in addition to what was developed by the cross-examination of his witnesses, read in evidence the petition in the divorce case already mentioned, the decree and judgment of the court in the divorce case, the letters of guardianship, and proved *aliunde*, that appellant did not support the children and their mother; that after the divorce he took no interest in the children, except that in 1881 he contributed about seventy-five dollars for their support; that with this exception the mother, by teaching school, supported the children until her death, in 1884; that after her death, on one occasion, appellee Lyon bought clothing for the little boy in the presence of appellant, who did not offer to pay for them; that the children are being well provided for, and are contented and happy in appellees' families, where they are being treated as members of the families; that they are very much attached to appellees and their wives, and object to going with appellant; that the attachment is mutual; that appellee Lyon is their uncle, and Mrs. Ferguson is their aunt on their mother's side. Appellant did not offer himself as a witness, nor did he testify in the case.

It is very plain from the whole case, that appellant's course towards the children has not been that of an affectionate and solicitous father. He alleged in his reply, that he had not contributed towards their support, except \$75 in 1881, for the reason that he had been denied correspondence with them and the privilege of seeing them. He did not attempt to prove this by himself, nor by any other witness. So far as shown, he did not see them during the life of their mother, subsequent to the divorce, nor did he make any effort to see them. The only attention he has shown them, so far as shown by the record, was the contribution of the \$75 and the institution of this proceeding for their custody. The natural impulse of all courts is to award the custody of children to the parents, because of the feeling that there they

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will be sheltered by the tender love and protecting care which they will not be so likely to receive elsewhere. Appellant's course, however, has not been such as to convince any one that in his custody, and domiciled with strangers in fact, although related by blood, they would receive the love and care they are now receiving from their mother's relatives. Indeed, appellant did not inform the court, except by statements in his reply, of what he proposed to do with the children, should their custody be awarded to him. For aught that appears from the evidence, his intention may have been to domicile them with strangers in fact and strangers in blood. A parent's fitness to have the custody of his children does not depend so much upon his wealth (if, indeed, that should ever be considered, except in pinching and abject poverty) as upon the tender attachment and watchful guardianship that spring from the relation. It is possible that a parent might have every other qualification, and so lack in these as to unfit him to have the custody and training of his children. To the extent that a parent may lack in these, to that extent his fitness to have the care and training of his children will be diminished. We do not mean by what is here said, that appellant is devoid of that parental love that might induce him to give the children proper care. We do hold, however, that considering his past course towards the children, the fact that he did not take the witness stand and inform the court of his purposes and provisions for a home for them, if their custody should be awarded to him, and considering the fact that the children are pleasantly and advantageously situated, we can not overthrow the decision of the trial court which leaves them, for the present, where they are. The trial court had the parties, the witnesses and the children before it, and was charged with the exercise of a sound discretion. We are unable to say that that court erred in judgment or abused its discretion. *Du-bois v. Johnson*, 96 Ind. 6; *Darnall v. Mullikin*, 8 Ind. 152.

The court below did not decide how long the children

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shall remain in the custody of appellees, nor how long appellant shall be deprived of their custody; neither does this court in affirming the judgment of the court below.

The judgment is affirmed, at appellant's costs.

Filed Dec. 17, 1885.

No. 12,110.

THE PENNSYLVANIA COMPANY v. MARION.

NEGLIGENCE.—*Sufficiency of Complaint Charging.*—In common law actions based on the negligence of the defendant, it must appear from the complaint, either by direct averment or from the statement of such facts as to a certainty raise the presumption, that the injury was the result of the defendant's negligence.

SAME.—*Negligence Depends on Facts of Case.*—Whether a party was negligent in a particular case depends on the facts in that case, without regard to whether the conduct of the party was that of an ordinarily prudent man. For instructions on this subject see opinion.

RAILROAD.—*Negligence.—Stepping from Moving Train.—Defective Depot Platform.*—A complaint against a railroad company by a passenger who was injured in stepping from a slowly moving train upon the platform of a regular station, alleging that the platform "had been suffered to get out of repair and wholly unsuitable for the reception of passengers," and that it had settled down in the center, forming an incline which caused the plaintiff to slip and fall under the train, of which defect the plaintiff had no knowledge, is not sufficient.

SAME.—*Degree of Care as to Platforms and Approaches.*—With respect to its platforms and approaches, a railroad company is only held to that reasonable degree of care which is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business.

SAME.—*Evidence as to Condition of Platform After Injury.*—Evidence as to the condition of the platform some time after the injury is not admissible, unless it be shown that its condition is substantially the same as at the time of the injury.

EVIDENCE.—*Proof of Value of Gratuitous Services in Action for Injury.*—Although the attendants on one suffering from an injury render their services gratuitously, he may, in an action for damages, prove the value of such services.

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PRACTICE.—Impeachment of Witness.—Corroboration.—It is for the jury to determine whether the evidence in corroboration of a witness should outweigh the impeaching evidence.

SUPREME COURT.—Pleading.—Consideration of Ruling on Demurrer.—Evidence.—Where a demurrer is filed to a complaint and overruled, the ruling must be considered upon its own merits, without regard to the evidence.

From the Owen Circuit Court.

S. O. Pickens, for appellant.

J. C. Robinson and *I. H. Fowler*, for appellee.

MITCHELL, J.—The complaint in this case avers that, on the 6th day of December, 1882, the plaintiff took passage on one of the defendant's trains at Gosport, in Owen county, to be carried thence to Mundy's Station, a regular passenger station on the defendant's line; that about a half mile from the station, which was reached about 11 o'clock A. M., the train on which he was proceeding slacked up so that when it reached the station it was moving at a very slow rate of speed, so that the plaintiff could have alighted therefrom with safety if there had been a suitable platform or other suitable place prepared for passengers to step upon when leaving the train; that there was a passenger depot and a platform for passengers to get on and off trains at Mundy's Station, but that the platform had been suffered to get out of repair and wholly unsuitable for the reception of passengers; that it had settled down, or become depressed in the middle so as to form an inclined plane from the car to the center of the platform. It is averred that while the train was running at a very slow rate of speed, and without any fault or negligence on his part, the plaintiff stepped upon the platform without any knowledge of its defective condition, when, owing to the inclination in the platform, his feet flew from under him, and he was thrown under the train, from which he suffered injury resulting in the necessity of having his right arm amputated.

The question is presented whether the facts thus stated

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constitute a cause of action. It is nowhere averred in the complaint, in terms, that the defendant was guilty of any negligence, or that anything was done or omitted negligently or carelessly. The plaintiff relies upon the facts stated to raise the inference or presumption of negligence without direct averment, and in this it may be said he has adopted, to say the least, an extremely hazardous method of pleading.

In all common law actions, the basis of which is the negligence of the defendant, negligence or its equivalent must be directly averred, or such facts must be stated as that a presumption of negligence arises.

It must appear from the complaint, either by direct averment or from the statement of such facts as to a certainty raise the presumption, that the injury was the result of the defendant's negligence, or that it was purposely committed. *Baltimore, etc., R. W. Co. v. Anderson*, 58 Ind. 413, and cases cited; *Indianapolis, etc., R. R. Co. v. Brucey*, 21 Ind. 215; *Terre Haute, etc., R. R. Co. v. Smith*, 19 Ind. 42; *Dyer v. Pacific Railroad*, 34 Mo. 127; *Thompson Neg.*, p. 1246.

Do the facts averred raise a presumption of negligence? The plaintiff, having voluntarily left his seat and alighted upon the platform while the train was in motion, is not in a position to claim the benefit of the well established rule which raises a presumption of negligence in favor of a passenger who, while conforming to the regulations of the carrier, or while passively seated in a car, sustains an injury in consequence of the car being thrown from the track, or other mishap to the train. It is only in cases where the deliberate volition and voluntary action of the passenger are not involved that such presumption arises. Speaking of this rule, it has been said: "It does not apply where the occasion of the hurt of the passenger was an active voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodation; and the reason is that in such cases it is necessary to consider

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whether there may not have been contributory negligence on the part of a passenger. It is only in respect of those accidents which happen to the passenger while he passively trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence, and care of servants, that the rule applies." *Thompson Car.*, p. 214. 2 *Wood Railway Law*, p. 1100.

Adopting the foregoing statement, we will consider briefly the supposed inculpatory statements contained in the complaint. The only matter of grievance charged is that the defendant suffered its platform at Mundy's Station to become out of repair; that it was so depressed in the center as to incline from that point toward the cars. The extent of this inclination is not averred, nor is it even stated that it rendered its proper and intended use dangerous. The strongest expression contained in the complaint, implying a disregard of the defendant's duty in respect to its platform, is, that it was "out of repair," and "wholly unsuitable for the reception of passengers." The only particular in which it was out of repair and unsuitable, as appears from the complaint, was its inclination from the cars toward the center.

Without more, we are unable to say, as matter of law, that this constituted negligence. Especially is this so, when we are asked to infer negligence in favor of the plaintiff, who shows in his complaint that he left the train while it was in motion, and, as we must presume, without the knowledge, consent or direction of the defendant's employees. To authorize a recovery for an injury so received, in any case, the negligence of the carrier ought not to be left to inference upon an equivocal statement of facts.

While it is the duty of a railroad company to keep its platform and approaches safe and convenient for the ingress and egress of passengers to and from its cars, the rigor of the rule which requires it, out of considerations of public policy, to exercise the highest possible diligence for the benefit of the passenger while in the actual progress of his journey, and

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holds it responsible for the slightest defect in its machinery, track and appliances, is measurably relaxed with respect to its platform and approaches. With respect of these, it is to be held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business. *Cincinnati, etc., R. R. Co. v. Peters*, 80 Ind. 168; *Pendleton Street R. R. Co. v. Shires*, 18 Ohio St. 255; *Thomp. Carriers*, pp. 104, 209, 214.

That the platform at a station of undisclosed consequence was suffered to get out of exact level to such an extent only as that nothing more can be said of it than that it was out of repair, and unsuitable, without being dangerous, will not authorize a legal presumption of negligence. So long as the approaches and platforms at stations are safe, and do not expose persons having occasion to use them to the chance of danger or inconvenience which may occasion hurt to them, it can not be said that the railroad company is negligent. Whether the platform was "suitable" or not was a matter of opinion upon which the defendant had a right to its judgment. The law can not be invoked until its safety becomes a question.

Since it results from the conclusions already stated that the judgment of the court below must be reversed, and as the complaint is not questioned in that regard, we need not determine whether, upon the facts stated therein, the plaintiff was guilty of contributory fault.

For the appellee it is contended that as a right result was reached on the whole case, a reversal should not follow, even if the ruling of the court on the demurrer to the complaint was erroneous.

Where a demurrer to a complaint is overruled, the complaint must stand or fall upon its own merits. We can not look into the evidence and from that determine whether

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to reverse or affirm the ruling on the demurrer. *Pennsylvania Co. v. Poor*, 103 Ind. 553.

In a case where there are two or more paragraphs in a complaint, if it affirmatively appears from special findings in the case that the verdict was returned upon a good paragraph alone, a judgment will not be reversed because there may have been a bad paragraph also. *Martin v. Cauble*, 72 Ind. 67.

The plaintiff having testified that the nurses who attended him while prostrated from the injury, did so voluntarily and without charge, was nevertheless permitted, over objection, to prove by his attending physician what their services were worth. This evidence was admissible under the rulings in *City of Indianapolis v. Gaston*, 58 Ind. 224, and *Ohio, etc., R. W. Co. v. Dickerson*, 59 Ind. 317.

These services were necessary to ameliorate the condition and suffering of the plaintiff. That they were voluntarily and gratuitously rendered was for his benefit, and not for the benefit of the defendant. *Klein v. Thompson*, 19 Ohio St. 569; *The Ferryboat D. S. Gregory*, 2 Ben. 226; *Cunningham v. E. & T. H. R. R. Co.*, 102 Ind. 478.

The injury to the plaintiff occurred on the 6th of December, 1882. The court admitted the evidence of Calvin T. Nation, over the defendant's objection, in which he described the condition of the platform on which the injury occurred, as it was in March following. The witness testified that at that time there was a plank "cupped up" from one-half to five-eighths of an inch at the place where the plaintiff fell. Without evidence that the platform was in substantially the same condition at the time of the injury as at the time to which the testimony related, it was not proper to admit it. *City of Indianapolis v. Scott*, 72 Ind. 196. Nothing of that kind appears in the testimony of Mr. Nation, but the fact may have been shown by other witnesses. It is not important in the present aspect of the case that we examine the evidence to determine this point.

A number of objections are taken to instructions given by

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the court. Some of the instructions are justly subject to the criticism of being too general in their character. As a rule, we think it may be said that instructions which deal with the particular case on trial, by an application of the law to the facts as they may be found in that case, rather than with the statement of general abstract questions of law on the subjects involved, are productive of better results. It is certain that there is less liability to error, and it is equally certain that it results in a better comprehension of the case by the jury.

That part of the fifth instruction in which it is said, that if, under all the circumstances, the act of leaving the train while in motion was one which an ordinarily prudent man in the exercise of reasonable care might reasonably be expected to do, the law would not regard it as negligent, even though it materially contributed to the injury complained of, was, to say the least, liable to mislead the jury. The formula used is that frequently adopted in attempting to define negligence. Like any other definition or abstract statement, it tends more to confuse than to instruct a jury as to what in any given case may constitute negligence. Whether the plaintiff was negligent or not depended upon the particular facts admitted or satisfactorily proved in the case. If the facts thus established constituted negligence, then whether they exhibited such conduct as an ordinarily prudent man might reasonably be expected to indulge in or not, it was none the less negligence. The most prudent men are not always exempt from carelessness, and when actually negligent, the law attaches the same consequences to their negligent conduct as to similar conduct in others. In estimating the value or relation of particular facts, it may well be that the jury may consider the conduct of men of ordinary prudence under similar circumstances, but it will not do to say, without regard to what the facts may be, that if the conduct involved is such as a prudent man would, or would not, have indulged under the circumstances, then the law pronounces one way or the

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other on such conduct. It is upon the facts established in each case that, in the end, the law must declare whether negligence was, or was not, imputable. *Pittsburgh, etc., R. W. Co. v. Spencer*, 98 Ind. 186.

Upon a careful examination of the instructions complained of, we are not prepared to say that any of them, except as already indicated, state the law incorrectly.

While the sixth instruction, relating to the weight to be given to the corroborated evidence of an impeached witness, may be a correct statement of the law in the abstract, it was nevertheless a question for the jury to determine whether the effect of the corroboration should outweigh the impeachment. *Morris v. State, ex rel.*, 101 Ind. 560, and cases cited.

Whether the motion for a new trial should have been granted upon the ground of newly discovered evidence, as prayed for, we do not determine, and whether upon the evidence, as set out in the record, the verdict was sustained, since the conclusions reached may result in another trial, it is manifestly better that we express no opinion.

The judgment is reversed, with costs, with instructions to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend, and for further proceedings.

Filed Dec. 16, 1885.

No. 12,173.

FORGERSON ET AL. v. SMITH, ADMINISTRATOR.

SUPREME COURT.—*Conclusiveness of Judgment.*—The judgment of the Supreme Court on appeal, as to all questions necessarily involved in the conclusion reached, rules the case throughout all its subsequent stages, and upon such questions it is conclusive upon the parties and those in privity with them.

SAME.—*New Parties.*—The fact that a new party comes into the case, over the objection of the other party, does not change the rule, as he will

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be considered to have elected to abide by the result of the case as if he had been in from the beginning.

DECEDENTS' ESTATES.—Discretion of Trial Court as to Evidence Concerning.—

The discretion with which the trial court is invested as regards testimony concerning matters affecting a decedent's estate, which occurred prior to the death of the decedent, must be determined upon the merits of each case.

SAME.—Interested Witness.—It is not an abuse of discretion to exclude a party from testifying as to oral declarations of the decedent, by which the witness expects to acquire property belonging to the decedent.

EVIDENCE.—Proof of Execution of Written Instrument.—It is not necessary that the execution of a written instrument should be proved by direct evidence; it is sufficient if its execution is fairly inferable from the facts and circumstances established by the evidence.

From the Tippecanoe Circuit Court.

J. R. Coffroth, T. A. Stuart, B. W. Langdon and T. F. Gaylord, for appellants.

W. C. Wilson, J. H. Adams and F. B. Everett, for appellee.

ELLIOTT, J.—This case is here for the second time. When it was here before we held that the third paragraph of the answer of the present appellants was bad, and, in effect, that the present appellee, then the appellant, was entitled to a recovery upon the evidence. *Smith v. Ferguson*, 90 Ind. 229 (46 Am. R. 216). The rule declared in that decision is the law of the case, and we are bound by it. Where there are incidental questions in a case which are not considered or decided, the court is not bound to consider the former decision as conclusively adjudicating upon them. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Davis v. Krug*, 95 Ind. 1. But where the questions are necessarily involved, and where the conclusion declared could not have been reached without either expressly or impliedly deciding such questions, the judgment on appeal rules the case throughout all its subsequent stages. The decision is an adjudication concluding the courts and the parties. It is not, of course, conclusive as to other cases, but it is conclusive as to the questions in judgment in the case in which it was rendered, upon the

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parties and those in privity with them. *Dodge v. Gaylord*, 53 Ind. 365; *Richmond Street R. R. Co. v. Reed*, 83 Ind. 9; *McClaren v. Indianapolis, etc., R. R. Co.*, 83 Ind. 319; *Braden v. Graves*, 85 Ind. 92; *Board, etc., v. Jameson*, 86 Ind. 154; *Gerber v. Friday*, 87 Ind. 366; *Anderson v. Kramer*, 93 Ind. 170; *Jones v. Castor*, 96 Ind. 307. The questions affecting the merits of the case were considered and decided in the former appeal, and we can not depart from the rule there declared.

The fact that a new party defendant came into the case, over the objection of the appellee, does not change the rule. The court in *Bitting v. Ten Eyck*, 85 Ind. 357, in speaking of parties who came into the case in the same manner in which Mrs. Forgerson came into the present case, said: "They came in of their own choice, against the protest of the plaintiff, and must be considered as having elected to abide by the result of the case as if they had been in from the beginning." There may possibly be cases where a new party would bring new elements into the case, so changing its character as to prevent the operation of the rule of which we have spoken; but, however this may be, the entrance of Mrs. Forgerson produced no such result in this instance. She claims in the same right, and no other, as that asserted by her co-defendant, and that claim was adjudicated upon the former appeal.

We regard the former decision as adjudicating all of the controlling questions in the case, for it was not possible to reach the conclusion there announced without deciding that the property in the promissory notes in controversy was in the administrator of the estate of Mahala Shaw, deceased. This was the ruling principle of the case; all other things were merely incidental and subsidiary. The question for judgment was, to whom did the notes belong? and upon this question there was an adjudication. It can not be successfully asserted that this point was not decided, and if it was, then, no matter what form the question assumed, the decision supplies a rule governing the case until the litigation is at an

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end. Accepting, as we must, the rule declared on the former appeal, and applying it to the answer and the evidence, we can do no otherwise than sustain the rulings of the court below upon the answer and upon the facts established by the evidence.

There are some questions arising on the rulings on the admission and exclusion of evidence not covered by the former decision, and we now proceed to consider and decide those questions.

The court refused to permit the appellants to testify as to matters which occurred prior to the death of Mahala Shaw. We understand counsel for the appellants to assert that in excluding this evidence there was an abuse of the discretion vested by the statute in the court. They refer to sections 498, 501, R. S. 1881, and the amendatory act of March 5th, 1883, and say :

“What is an abuse of the court’s discretion under this statute, has not been considered in this court so far as we know. It is a highly important matter in the daily administration of justice. The exercise of the discretion in this respect in the different trial courts is as variant as the extent of learning or bent of mind of those who, from time to time, preside over them. So a litigant may be able to recover in one county in this State in an action which would be defeated if brought in another county. This is not law. Prior to 1881 the exercise of this discretion was not reviewable, but in that year the Legislature amended the statute, so that abuses in this regard could be overhauled. The viciousness of a system of laws whose operation rests in the undefined and uncontrolled fiat of one man, should be reduced to a minimum by courts as well as Legislatures. That is the purpose of the act of 1881 ; it does recognize the evils, and leaves it to the learning and sound discretion of this court to see that they are abated when properly brought up. Of course no formal definition of what will constitute an abuse can be laid down for all cases, and whether there has been an abuse in any case must largely de-

Forgerson et al. v. Smith, Administrator.

pend upon its peculiar circumstances. The policy of the statute is plainly to thwart or prevent the advantages which may arise where one person may speak to a fact and the other can not be heard. That is a good *general* rule ; but whenever it appears that the advantages are being turned the other way, the reason of the rule ceases, and should not stand in the way. It would seem that where the dangers of perjury are removed, where the character of the party appears of record to be worthy of credence and to be trusted by the court, and where it appears that the living litigant has, by creditable witnesses, made such a claim or defence as to make it appear that injustice and wrong will have the upper hand, and that the estate is obtaining a forced advantage, unless the party be permitted to speak, the rule should become the exception, as the statute intended."

It seems to us that this argument supplies strong reasons for overthrowing the position it was intended to fortify. It appears quite clear to our minds that the trial court must judge when the danger of perjury is removed, and must also determine what witnesses are worthy of credence, and when it is proper to permit a party to testify. No other court can so accurately determine the questions as the court in whose presence the witnesses and parties stand. It may be that it would be wiser to positively admit, or to directly exclude by statute and leave nothing to the discretion of the court, all parties in cases where the testimony refers to the acts or words of a deceased person, but that is a matter for the Legislature, and not for the courts. We incline to adopt the view of counsel, that, under the act of 1883, no general rule can be laid down, but that each case must be determined upon its peculiar characteristics. Granting this to be true, we think this is a case where parties should not be allowed to testify. It is at best a doubtful policy to permit a decedent's property to be disposed of upon mere words ; at all events these words should not come from interested witnesses when the lips of the owner have been closed by death. We regard this as a case where

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the trial court may wisely affirm that interested parties shall not be permitted to acquire property upon their own testimony as to the disposition verbally made of it by the deceased person. It is difficult in any case to repeat words as they were uttered, even where interest adds no coloring and gives no bias, and it is not an abuse of discretion to exclude parties from testifying as to oral declarations, where they build their hopes of obtaining property upon the spoken words of one whom death has rendered incapable of speaking.

We need not decide whether there was, or was not, error in excluding the testimony of William Conklin as to statements made by Forgerson, for, conceding the competency of the evidence, it is quite clear that its exclusion did the appellants no substantial injury.

We think there was evidence tending to prove the execution of the receipt admitted in evidence. It is not necessary that the execution of a written instrument should be proved by direct testimony; it is enough if the execution is fairly inferable from the facts and circumstances established by the evidence.

Judgment affirmed.

Filed Dec. 16, 1885.

No. 12,147.

WEST ET AL. v. HAYES.

PLEADING.—*Complaint on Promissory Note.—Defect in, Cured by Exhibit.—Assignment of Error.*—When questioned first by an assignment of error, a complaint on a promissory note, which fails to aver that the note was due when the action was commenced, will be deemed cured when the copy filed with the complaint shows such fact.

PROMISSORY NOTE.—*Pleading Unliquidated Damages in Set-Off.—Malicious Prosecution of Civil Action.*—To a complaint on a promissory note an answer that the plaintiff had maliciously and without cause procured the prosecution of a civil action against the defendant which was still pend-

104	251
181	636
104	251
145	529
104	251
152	64

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ing, and that he had been and would be put to great cost and expense in defending such action, whereby the note in suit had been fully satisfied, is bad.

From the Dearborn Circuit Court.

J. K. Thompson, for appellants.

J. S. Jelley, for appellee.

NIBLACK, C. J.—This cause was entitled in the court below, *Caroline M. Hayes v. Warren West and Nancy West*, and the body of the complaint, which was filed on the 25th day of July, 1884, was as follows: "The above named plaintiff, Caroline M. Hayes, complains of said defendants, Warren West and Nancy West, and says that the defendants, on the 23d day of March, 1883, by their note, a copy of which is filed herewith, promised to pay the plaintiff five hundred dollars, which remains unpaid, and the plaintiff demands judgment for seven hundred dollars."

The copy of the note filed with the complaint corresponds with the description given above, except that the note was thereby shown to have been payable one year after date.

The defendants answered: *First*. That the defendant Nancy West was the principal debtor upon the note, and that her co-defendant Warren West was only surety thereon; that said note was given as a part of the consideration for the conveyance, by the plaintiff and her husband, Ezra G. Hayes, of particularly described real estate situate in Dearborn county, in this State, to the said Nancy West, who still held and owned said real estate, and upon which the unpaid purchase-money was still a lien for the protection of him, the said Warren West; that such conveyance was executed on the 23d day of March, 1883, the day on which the note sued on was given, and that at the same time another note for a like amount was executed and as a part of the same consideration, which note was still held by the plaintiff; that the plaintiff had nevertheless induced and procured her husband, the said Ezra G. Hayes, to wrongfully, maliciously and op-

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pressively prosecute a suit in the Dearborn Circuit Court against the defendants herein, for her use and benefit, in which a judgment for the sum of \$16,000 was demanded on account of said real estate which she, the said Nancy West, had also, before that time, lawfully purchased at a sheriff's sale for the sum of \$5,269.69, and had, on the 2d day of June, 1881, received a sheriff's deed therefor; that the conveyance made by the plaintiff and her husband to her, the said Nancy West, as herein above stated, was in consideration of the sum of \$1,000, for which two notes of \$500 each were executed as above set forth; that she, the said Nancy, had paid the amount for which she purchased such real estate at sheriff's sale in cash, and that hence said suit, in which a judgment for \$16,000 was demanded, was groundless as well as malicious; that the plaintiff continued to prosecute said suit, and to thereby annoy and harass the defendants; that the plaintiff, through her said husband, had filed an affidavit in said cause for a change of venue from the county of Dearborn, by reason of which the defendants had been put to great trouble and expense for attorneys' fees, amounting to the sum of \$500; that the plaintiff was, through her said husband, maliciously and without any good cause, threatening to persist in demanding and obtaining a change of venue of said cause, and in having the same tried in another jurisdiction; that the said Ezra G. Hayes was insolvent and had no property subject to execution; that if said threat should be put into execution, the defendants would be subjected to an additional expense of \$500; that in a suit in the Ohio Circuit Court, in which the defendant Warren West was plaintiff and the said Ezra G. Hayes was defendant, which was determined in favor of the said Warren West, a judgment was rendered therein for the latter for \$3,035.20 and costs of suit taxed at \$100, all of which remained unpaid and which could only be collected, if at all, out of property mortgaged to secure the same; that the note in suit was fully

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satisfied by the costs, expenses and damages to which the defendants had been subjected as herein charged.

This paragraph of answer was, upon demurrer, held to be insufficient as a defence, and, issue being joined upon other paragraphs of answer, the court made a finding in favor of the plaintiff, assessing her damages at \$520.90, and caused judgment to be entered accordingly.

A question is now made for the first time upon the sufficiency of the complaint. It is also claimed that the circuit court erred in sustaining a demurrer to the paragraph of answer, the substantial allegations of which are given as above.

The alleged insufficiency of the complaint is urged upon the ground that it did not aver that the note in judgment was due at the time of the commencement of this suit. It is true that the body of the complaint did fail to aver that the note had, at that time, become due and payable, but the copy of the note filed with the complaint supplied the omitted averment, and cured the defect complained of. *Lentz v. Martin*, 75 Ind. 228.

We know of no theory upon which the paragraph of answer under consideration can be held to have been sufficient as a defence to the action. In the first place, it is well settled that a person can not maintain an action for the malicious prosecution of a civil suit against him, until the legal termination of the suit complained of as malicious, in his favor. In the next place, the general rule is that unliquidated damages can not be pleaded by way of set-off, and nothing is alleged in the paragraph of answer before us which takes this case out of that general rule. *McCullough v. Rice*, 59 Ind. 580; *McCardle v. McGinley*, 86 Ind. 538 (44 Am. R. 343); *Wait's Actions and Defences*, vol. 4, 347, vol. 7, 481.

The judgment is affirmed, with costs.

Filed Dec. 19, 1885.

Butner v. Bowser *et al.*

No. 12,295.

BUTNER v. BOWSER ET AL.

EXEMPTION FROM EXECUTION.—*Statutes Giving, Must be Liberally Construed.*

—Statutes providing for the exemption of a reasonable amount of property from seizure or sale for the payment of contract debts must be liberally construed.

SAME—Judgments.—Set-Off.—The holder of a judgment can not set it off against a judgment held by the judgment debtor against him, where the property of the latter, including his judgment, is of a value less than six hundred dollars, all of which he claims as exempt.

From the Boone Circuit Court.

F. M. Charlton and *T. W. Lockhart*, for appellant.

C. M. Zion, for appellees.

HOWK, J.—On and before the 17th day of January, 1885, the appellees, Bowser and Trout, the plaintiffs below in this cause, owned and held a judgment against the appellant, Butner, for the sum of \$238.87, rendered in the court below upon a promissory note executed by Butner, which judgment was in full force and wholly unpaid. On and before such 17th day of January, 1885, appellant Butner was the owner and holder of two judgments against the appellees Bowser and Trout, one for \$56.75, and the other for \$65.96, both of which judgments were rendered in the court below, and were in full force and wholly unpaid. The appellees, on the day and year aforesaid, filed their written motion or complaint in this cause, setting up substantially the facts above stated and praying that the judgments, so owned and held by appellant Butner, might be set off against an equal amount of the appellees' judgment against him, Butner, and for judgment against the latter for the residue of their judgment and for other proper and equitable relief.

To this motion or complaint appellant Butner answered in two special or affirmative paragraphs, to each of which the appellees' demurrer, for the alleged want of facts therein to constitute a defence to their suit, was sustained by the court.

104	255
126	306
126	300
127	284
104	255
126	498
104	255
149	515
104	255
153	228

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Butner excepted to these rulings, and declined to amend either of such paragraphs of his answer. He then answered further, by a general denial of the motion or complaint. The issues joined were tried by the court, and findings were made (1) of the amount due appellees on their judgment, (2) of the amount due Butner on his judgment, and (3) of the amount of the residue yet due the appellees, after setting off enough of their judgment to satisfy the amount due Butner on his judgments. Thereupon the court made and rendered its orders and judgment in accordance with its finding and as prayed for in appellees' motion or complaint. Butner's motion for a new trial having been overruled by the court, he has appealed from the judgment below to this court.

The evidence on the trial is not in the record, and the only errors assigned by Butner, which are discussed by counsel or present any question for our decision, are based upon the rulings of the court below, in sustaining appellees' demurrers to the first and second paragraphs of his answer.

In the first paragraph of his answer, Butner alleged in substance that, on the 9th day of October, 1884, appellees caused an execution to be issued by the proper clerk, upon their judgment against him, and placed the same in the hands of the sheriff of Boone county; that such execution remained in full force until January 29th, 1885, when it was returned by such sheriff, as shown by his return thereon; that, on the 14th day of January, 1885, such sheriff made a demand upon Butner for the payment and satisfaction of such execution; that Butner on the same day, claiming an exemption of his property from levy and sale under such execution, pursuant to such claim, then and there selected for his appraiser Nelson Lucas, a resident householder of Boone county, and such sheriff selected for appellees, as an appraiser, John Christy, a resident householder of such county; that on the 28th day of January, 1885, such appraisers, having been legally qualified, duly made an appraisal of the articles named in the schedule and inventory of appellant's property, a copy of

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which was filed with and made part of such paragraph of answer; and that the sum total of such appraised articles amounted to \$469.85.

Butner further alleged such facts as showed that the schedule and inventory of his property strictly conformed to the requirements of section 714, R. S. 1881, and contained all the statute required, and that the aggregate value of all his property was less than six hundred dollars; that he, Butner, was a resident householder of Boone county, and had been such since the issuing of appellees' execution, and, as such, on January 29th, 1885, he subscribed and was sworn to such inventory and appraisement, as required by law; and that he claimed at the time, and since, and still claimed, all the articles of property in such schedule and inventory as exempt from levy and sale upon appellees' execution; that appellees' judgment, on which their execution was issued, was recovered against him, Butner, on his contract, to wit, upon a promissory note executed by him on November 3d, 1883, and was the same judgment sought to be set off against him by appellees in this suit; that appellant's judgment against the appellees, which they were seeking to set off against their judgment and to have entered as a credit thereon, was included in his schedule and inventory, and was claimed as exempt by the appellant, and was so set off to him by such sheriff, and was appraised in such inventory at \$50.96, not including an attorney's fee lien thereon for \$15; that on the 29th day of January, 1885, appellant tendered such schedule and inventory of his property to such sheriff, who accepted and made the same a part of his return of appellees' execution, which he returned *nulla bona*, on such last named day; and that he was not the owner of the Markland judgment against the appellees, as alleged in their motion, nor had he any interest therein. Wherefore, etc.

In the second paragraph of his answer Butner filed therewith an inventory of all his property, of every kind and de-

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scription, in conformity with the provisions of section 714, R. S. 1881; and he demanded "that six hundred dollars of property in value be set off to him as exempt from levy and sale," and he therein named and selected for his appraiser Nelson Lucas, a resident householder of Boone county, to make appraisement of the articles set out in such inventory, and he asked appellees to select an appraiser of such county to join the one selected by him. Butner then averred that all the articles set out in his inventory, and that all his property, real and personal, within or without this State, would amount to less than \$600 in value; that among the articles named in such inventory was his judgment for \$65.96 against the appellees, which they, in their motion, were seeking to have set off against their judgment against him; that appellees' judgment was recovered upon his contract, to wit, his promissory note, dated November 3d, 1883; that he was a resident householder of Boone county, and as such was entitled to an exemption of \$600 in value, of all his property, which he thereby demanded as exempt; and he demanded that his judgment against the appellees, described in his inventory, which was the same judgment they were seeking in this suit to have set off against their judgment, should be exempted from levy and sale. Wherefore, etc.

In section 22 of the Bill of Rights in our State Constitution, it is provided as follows: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." The General Assembly of this State, at its first session after the adoption of our present Constitution, enacted a law recognizing "the privilege of the debtor to enjoy the necessary comforts of life," and exempting an amount of property, not exceeding in value three hundred dollars, owned by any resident householder, from seizure or sale for the payment of any debt or liability growing out of or founded upon a contract, express or implied. Afterwards

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by an act which took effect and became a law May 31st, 1879, in further recognition of the privilege of the debtor to enjoy the comforts of life, the Legislature increased the amount of property so exempted to him to an amount not exceeding in value six hundred dollars. In the protection of the debtor's privilege to enjoy the necessary comforts of life, this court has always kept pace with the General Assembly, and has uniformly held that statutes of exemption are to be liberally construed. Thus, in *Haas v. Shaw*, 91 Ind. 384 (46 Am. R. 607), the court said: "The privilege of the debtor to claim a reasonable exemption of property, from seizure or sale for the payment of his contract debts, is a constitutional right, and the 'wholesome laws,' wherein such right is recognized and provision made for its exercise, must be liberally construed. Where, as in this case, the answer of the debtor shows that he has asserted his claim to an exemption, at the proper time and in substantial compliance with the requirements of the statute, it must be held to be sufficient on a demurrer thereto. Where the right to claim an exemption clearly exists, under the law, merely formal or technical objections will not be allowed to prevent the debtor from claiming the benefit of his exemption." In support of the proposition that statutes of exemption must be liberally construed by the courts, we also cite the following cases: *Gregory v. Latchem*, 53 Ind. 449; *Kelley v. McFadden*, 80 Ind. 536; *Puett v. Beard*, 86 Ind. 172 (44 Am. R. 280); *State, ex rel., v. Read*, 94 Ind. 103; *Barkley v. Mahon*, 95 Ind. 101; *Good v. Fogg*, 61 Ill. 449 (14 Am. R. 71); *Kuntz v. Kinney*, 33 Wis. 510; *Carty v. Drew*, 46 Vt. 346; *Allison v. Brookshire*, 38 Texas, 199; *Seeley v. Gwillim*, 40 Conn. 106.

We are of opinion, upon the facts stated in each paragraph of Butner's answer in the case in hand, that he has a constitutional and statutory right to claim his judgment against the appellees, as a part of his exemption under the law. Ordinarily, no doubt, the appellees would have an equitable claim to have

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Butner's judgment set off and satisfied by an equal amount of their judgment against him ; but this equitable claim of the appellees must yield to, and is overcome by, the constitutional and statutory right of Butner, upon the facts of this case, to claim his judgment against them as a part of his exemption. This is, in effect, decided by this court in the well considered case of *Puett v. Beard*, *supra*, which was very similar to the case at bar. The court there said : " It is held in *Temple v. Scott*, 3 Minn. 419, by a divided court, that the right of set-off will prevail in such a case as this ; but the opinion assumes, what is almost universally denied, that the statute of exemption is to be strictly construed, and, starting from this erroneous premise, it is not strange that a wrong conclusion was reached. Our court has, in consonance with the decided weight of authority, held that the statute is to be liberally construed. *Gregory v. Latchem*, 53 Ind. 449. A liberal construction of the statute would lead to a different result from that reached in *Temple v. Scott*, *supra*, and Judge Thompson has shown, by arguments which seem to us unanswerable, that the entire reasoning of the Minnesota court is unsound. *Thompson Homestead & Exemp.* 893. Two cases are cited by this author sustaining his view that the right of set-off does not exist, *Curlee v. Thomas*, 74 N. C. 51 ; *Wilson v. McElroy*, 32 Pa. St. 82, and to these may be added *Duff v. Wells*, 7 Heisk. 17."

In the cause under consideration our conclusion is that the trial court clearly erred in sustaining appellees' demurrers to the first and second paragraphs of Butner's answer.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrers to the first and second paragraphs of answer, and for further proceedings not inconsistent with this opinion.

Filed Dec. 19, 1885.

Riggs v. The State.

No. 12,740.

RIGGS v. THE STATE.

CRIMINAL LAW.—*Indictment for Larceny of Money.—Description of Money.—*

Constitutional Law.—An indictment charging the defendant with having stolen "five hundred and twenty dollars of the paper currency, money and bank notes, current in the United States," is, under section 1750, R. S. 1881, sufficient as to the description of the money. The said section is not in conflict with the provision of the Constitution which provides that "the accused shall have a right to demand the nature and cause of the accusation against him."

SAME.—Evidence.—One from whom money has been stolen is only required to give the best description of it attainable, and to show an excuse for not doing more.

From the Fayette Circuit Court.

B. F. Claypool and *J. H. Claypool*, for appellant.

F. T. Hord, Attorney General, *L. M. Develin*, *R. Conner* and *H. L. Frost*, for the State.

ELLIOTT, J.—The property which the appellant is charged to have stolen is thus described: "Five hundred and twenty dollars of the paper currency, money and bank notes, current in the United States, a more particular description of which currency, money and bank notes affiant can not give; said five hundred and twenty dollars being then and there the personal property of this affiant, Samuel Lamberson, and then and there of the value of five hundred and twenty dollars."

The description of the money alleged to have been stolen is sufficient under the provisions of section 1750 of our statute. It is true that the exact words of the statute are not employed, but it is affirmed by a long line of decisions that it is not necessary to use the words of the statute, provided words of equivalent meaning are used. *State v. Miller*, 98 Ind. 70; *Toops v. State*, 92 Ind. 13; *Howard v. State*, 87 Ind. 68; *State v. Allisbach*, 69 Ind. 50; *Shinn v. State*, 68 Ind. 423; *Stuckmyer v. State*, 29 Ind. 20; *Malone v. State*,

104	261
159	214
104	261
159	214

Riggs v. The State.

14 Ind. 219; *Marble v. State*, 13 Ind. 362; *Pelts v. State*, 3 Blackf. 28; *State v. Bougher*, 3 Blackf. 307.

As the language employed in the affidavit and information is equivalent in meaning to that which the statute declares shall be sufficient, the ruling of the trial court denying the motion to quash must be sustained, unless the statute is unconstitutional. It is affirmed that it is so because in conflict with the provision of the Constitution, that the accused shall have a right "to demand the nature and cause of the accusation against him, and to have a copy thereof."

We have no doubt that a statute attempting to deny an accused the right to demand the nature of the charge preferred against him would be void. It is not in the power of the Legislature to deprive one accused of crime of the right to demand information of the nature of the crime which he is charged with having committed. *Miller v. State*, 79 Ind. 198; *Landringham v. State*, 49 Ind. 186; *McLaughlin v. State*, 45 Ind. 338; *State v. O'Flaherty*, 7 Nev. 153.

We agree with Mr. Bishop that "The 'nature and cause' of accusation are not stated where there is no mention of the full act or series of acts for which the punishment is to be inflicted." 1 Bishop Crim. Proc., section 88. This rule requires that the indictment or information shall contain the essential elements of the crime charged, although, as said in *State v. O'Flaherty, supra*, "The power of the Legislature to mold and fashion the form of an indictment is plenary."

If the statute under examination can be regarded as depriving an accused of the right "to demand the nature and cause of the accusation against him," it must fall. The question is, does it deprive an accused of that right? Our judgment is that it does not. It does not dispense with a statement of any of the essential ingredients of a criminal offence, but merely prescribes a rule for the description of bank notes, or coin, current as money, when the property stolen is of that class. It does not profess to dispense with all description of the property stolen, but simply declares what description shall

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be sufficiently specific. It does not attempt to dispense with a description of the class or kind of property, but merely provides that "it shall be sufficient to describe such money, bills, notes, or currency simply as money, without specifying any particular coin, note, bill, or currency."

The statute is confined solely to the matter of description, and provides the method of describing a particular kind or class of property. The description of the class or kind of property, accompanied by a statement of all the essential ingredients of the crime, is sufficient to inform the accused of the nature and cause of the accusation against him. The Constitution does not require that an accused shall have a right to a specific statement of the charge against him, but the requirement is that he shall be informed of the nature of the charge. There is a material difference between a provision dispensing with a description of the stolen property entirely, and one prescribing the degree of particularity to be observed in giving the description, for the nature of an offence may not be stated where there is no description at all, but may be stated by a description of the class or kind of property, although it is not specifically described. It has always been held that where a person from whom property has been stolen is unable to describe it, the indictment will be sufficient if it alleges an excuse for not giving a particular description. 2 Bishop Crim. Proc., section 705. Any other rule would often permit the thief to go unpunished. As was said by us in *McQueen v. State*, 82 Ind. 72, "It would be unreasonable to expect one who is robbed of money, or its representative, to give an accurate description of it, and it would render it almost impossible to convict a thief or a robber if courts should undertake to require the prosecutor in all cases to give a particular description of the money or note feloniously taken. The failure to give an exact description can never endanger the liberty of an innocent man, but the enforcement of such a rule as that for which counsel contend would furnish the guilty with ready and easy means of escape."

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We refer to these authorities for the purpose of showing that it has ever been the law that particularity of description may be dispensed with, and that there is a material difference between such matters and the essential elements of a criminal offence. If a grand jury, or a prosecuting attorney, may dispense with particularity of description, certainly the supreme legislative power of the commonwealth may do so.

It is only where a statute is clearly unconstitutional that it will be overthrown by the courts, and the one before us certainly can not be regarded as so clearly in conflict with the Constitution as to warrant us in declaring it void. *Robinson v. Schenck*, 102 Ind. 307. So far are we from regarding the statute under consideration as clearly unconstitutional, that we are well satisfied that it is plain that it is not in conflict with the Constitution.

We can not reverse the judgment upon the ground that the money stolen from Lamberson was not particularly identified. It would be unreasonable to require a man who has lost a large sum of money to particularly describe the various notes and bills. All that can be done, and all that need be done, in such a case, is to give the best description attainable, and show an excuse for not doing more. The statute to which we have referred declares this rule, and in doing this does little more than express the rule of the common law.

Judgment affirmed.

Filed Dec. 17, 1885.

No. 11,095.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY v. NEWELL.

RAILROAD.—*Negligence.—Broken Rail.—Presumption.—Burden of Proof.*—

Where a car, by the breaking of a rail, is thrown from the track, resulting in injury to a passenger, a presumption of negligence arises against the railroad company, which it must rebut by clear and explicit proof

104 264
196 190

104 264
128 466

104 264
134 302

136 71

104 264
137 510

104 264
141 551

104 264
154 573

155 96

104 264
163 368

104 264
167 82

168 475

104 264
170 210

170 211

264
46

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that the accident could not have been avoided by the utmost skill and care, and as to showing the facts essential to negative such presumption the burden is on the company.

SAME.—*Breaking of Successive Rails at Same Place.—Instruction to Jury.*—In an action against a railroad company to recover damages for an injury caused by an accident resulting from a broken rail, an instruction to the jury, that if they find from the evidence that such rail had been put down in place of another which had broken the same morning at the same place, they might consider this fact in determining whether the rail which caused the accident was a good one, and whether it was properly and carefully put down, is proper.

SAME.—*Instruction as to Measure of Damages.—Province of Jury.*—In an action for personal injury, an instruction to the jury that in estimating damages they may consider past and future suffering, the value of time lost, or likely to be lost, whether the injury is likely to be permanent or not, and its probable effect upon the future health of the party, and upon all the facts ascertain the extent of the injury and award such damages as in their judgment "will compensate, so far as money can," for such injury, is not erroneous as invading the province of the jury.

EVIDENCE.—*Personal Injury.—Expressions of Pain.*—Where it becomes important to illustrate the physical or mental condition of a person, either at the time an injury is received, or from thence to the time of an inquiry as to its nature and effect, expressions of present existing pain or malady, and of its locality, whether made at the time the injury is received or subsequent to it, are admissible in evidence, regardless of the person to whom they are made.

SAME.—*Statements to Physician after Commencing Action.—Expert.*—As the basis of his opinion, a physician may testify to statements made by a patient in relation to his symptoms and condition, both past and present, when received during and necessary to an examination with a view to treatment, or when necessary to enable him to give his opinion as an expert, although such statements are made after the patient has commenced an action to recover damages for the injury.

SUPREME COURT.—*Erroneous Instruction, if Harmless, will not Authorize Reversal.*—A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that such instruction did not influence the jury in making their verdict.

From the Marion Superior Court.

H. H. Poppleton, A. C. Harris and W. H. Calkins, for appellant.

B. Harrison, C. C. Hines, W. H. H. Miller, J. B. Elam, J. W. Gordon and S. M. Shepard, for appellee.

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MITCHELL, J.—This action was brought by Lyne S. Newell against the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, to recover for alleged injuries to his person, suffered while being carried as a passenger from the city of Indianapolis to Bellefontaine, Ohio. When near the place of destination, the coach in which he was seated was thrown from the track in consequence of the breaking of a rail over which it passed. Whether the rail broke because of the prevailing cold weather, or from defects inhering in it or in the roadway at that point, or from the defective manner in which the rail was adjusted in the track, were controverted questions.

The jury returned, in answer to special interrogatories, that the defendant was in fault in not having placed the rail, the breaking of which resulted in the accident, in proper position; that the fish-plates which should have held it in place were not securely bolted, and that the rail itself was defective from wear. They also returned that the road-bed at the place where the broken rail was found was not in every respect in good condition. Other interrogatories were submitted and answered, but, except as already stated, the answers impute no neglect to the defendant.

It is contended that neither the general verdict nor the answers to interrogatories, so far as they inculcate the defendant, are supported by the evidence.

Without detailing the evidence to any extent, it may be sufficient to say, that it at least leaves in some doubt the question of the condition and fitness of the rail which broke. Moreover, the fact that another rail was found broken, only several hours before, at the same place, gave room for an inference that there may have been some defect in the roadway at that point.

In respect to all these matters it was incumbent on the defendant to remove all reasonable inferences of neglect by clear and explicit proof. That the coach was thrown from the track was of itself sufficient to raise a presumption of

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negligence against the defendant. Public policy requires of the carrier in such cases, that it shall affirmatively show that it had taken all usual and practical precautions, as applied to the careful and capable management of passenger railways, to maintain its track, roadway and appliances for carrying in a safe condition. While its obligation does not rise to the degree of warranting the safety of its track and roadway, the law nevertheless exacts that when an injury occurs to a passenger by an occurrence so unusual and so perilous to human life, it shall make it appear that the utmost practical care and diligence had been observed, and that no degree of care usually and practically applicable to the careful management of like railways would have discovered the defect which probably caused the accident, and thus prevented its occurrence. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551.

The investigation necessarily involved an inquiry into the fitness and condition of the particular rail, the breaking of which was the immediate cause of the accident. The condition of the roadway at that point also became a proper subject of inquiry. If, in the course of the investigation, facts were developed which left the questions of the condition of the roadbed, or whether the rail was properly adjusted in the track, or whether it was defective from wear, involved in doubt, then, however satisfactory the proof of general diligence may have been, the inference of negligence with respect to the immediate cause of the accident may still have remained.

While it may be conceded that the evidence fully established the defendant's general diligence in the maintenance of its track and appointments, it can not be denied that the rail which was found broken had been taken out of the track before the accident at a point near by because of its want of exact uniformity in height with another to which it was matched. Another rail had broken at the same place on the morning of the accident, and this rejected rail had been put in its place. It can not be said that its fitness for use was in

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every respect satisfactorily shown; neither can it be said that the condition of the roadway at the place where two rails broke in such quick succession was so definitely established as to repel the inference of probable defect. If it had been the fact, it seems to us it must have been within the power of the company to have shown by persons of skill and experience in railroad management, that the use of a rail of slightly uneven height was a proper and usual thing under the circumstances, or that the condition of the atmosphere was such as to have accounted for the successive breaking of good rails, properly laid on a sufficient roadway.

Upon these points the evidence is not satisfactory, and considering all the evidence, with the presumption which the law raises, we can not say that either the general verdict or the answers to special interrogatories are without support.

The extent of suffering, and the nature and probable permanency of the injuries sustained by the plaintiff, became a subject of inquiry at the trial.

Subsequent to the commencement of the suit, the plaintiff submitted himself to an examination by Dr. Jameson. It may be inferred from the plaintiff's testimony, that the examination was procured for the double purpose of ascertaining the nature and extent of his injuries and of receiving treatment which was prescribed, and also to qualify the physician as a medical witness to represent his condition in the approaching trial. We infer, however, that Dr. Jameson knew of no purpose beyond that of treatment at the time the examination was made.

At the proper time Dr. Jameson was called as a witness on plaintiff's behalf, and in the course of his examination he was asked the following question: "Where did he complain of his injury—where did he say it was?" Over the defendant's objection, the witness answered as follows: "He said he was suffering a great deal of pain and tension in the lower portion of the back—in the lumbar region—across the small of the back." Again, the witness, further on in his testimony, said,

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in answer to a series of questions: "That he complained of a sensation of numbness in the lower extremities, and those parts of the body below the part that would correspond with the injured part of his spine; and I think he complained, also, of a sense of constriction, but of that I would not be positive."

This ruling of the court is made one of the grounds of the motion for a new trial.

Counsel for appellant insist that exclamations of pain, in order to be admissible in evidence, must be contemporaneous with the alleged injury and the then existing facts, and that they must have been made before sufficient time elapsed to enable the person making them to form plans for future lawsuits.

They insist, further, that they must have been made *ante litem motam*, not only before suit brought, but before the controversy existed in any form.

In a general sense, and as applicable to a different class of cases, the rule as stated by counsel is approximately correct. Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of an inquiry as to its severity, effect and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evidence. *Carthage T. P. Co. v. Andrews*, 102 Ind. 138; *Town of Elkhart v. Ritter*, 66 Ind. 136; *Howe v. Plainfield*, 41 N. H. 135; *Towle v. Blake*, 48 N. H. 92; *Kennard v. Burton*, 25 Maine, 39; *Hyatt v. Adams*, 16 Mich. 180; *Elliott v. Van Buren*, 33 Mich. 49 (20 Am. R. 668); *Brown v. New York Cent. R. R.*, 32 N. Y. 597; *Matteson v. New York Cent. R. R. Co.*, 35 N. Y. 487; *Johnson v. McKee*, 27 Mich. 471; *Earl v. Tupper*, 45 Vt. 275.

Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity, as

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being the only means of determining whether pain or suffering is endured by another. Whether feigned or not is a question for the jury.

Such declarations and expressions are competent, regardless of the person to whom they are made. They are especially competent and of more weight when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by the direction of a court, for the purpose of basing an opinion upon as to the physical situation of the person whose condition is the subject of inquiry. *Quaife v. Chicago, etc., R. W. Co.*, 48 Wis. 513 (33 Am. R. 821); *Atchison, etc., R. R. Co. v. Frazier*, 27 Kan. 463.

It is only when such declarations assume the form of a narrative of past experience or suffering, or of a relation of the cause and manner of the injury, or where they are made *ante litem motam* to one not an attending physician or a medical expert under the condition above mentioned, that their admissibility becomes the subject of serious discussion.

Statements of past sufferings and pains, when not made to a medical expert for the purpose of enabling him to form an opinion upon with a view to treatment or other legitimate purpose, are clearly inadmissible. *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Bacon v. Charlton*, 7 Cush. 581. And statements of the cause of the injury or of past occurrences, made to any one, unless made so nearly contemporaneous with the principal fact to which they relate, or unless they are made while the transaction is in progress, so as to constitute a part of the *res gestæ*, are also inadmissible. *Inhabitants, etc., v. Inhabitants, etc.*, 99 Mass. 47. When so related or connected as to become part of the *res gestæ*, they may be received as evidence bearing on the principal fact. *Insurance Co. v. Mosley*, 8 Wall. 397.

The rule is not to be extended beyond the necessity upon which it is founded. Past events and the manner in which an injury was received are ordinarily susceptible of proof by

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direct evidence. For that reason such statements, not made contemporaneous with the occurrence, or so near it as to become part of the transaction, no matter to whom made, are inadmissible. *Chapin v. Marlborough*, 9 Gray, 244; *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 438.

A physician may, however, testify to a statement or narrative given by a patient in relation to his condition, symptoms, sensations and feelings, both past and present, when such statements were received during and were necessary to an examination with a view to treatment, or when they are necessary to enable him to give his opinion as an expert witness. *Quaife v. Chicago, etc., R. W. Co.*, *supra*; *Barber v. Merriam*, 11 Allen, 322; *Looper v. Bell*, 1 Head, 373; *Yeatman v. Hart*, 6 Humph. 374; *Eckles v. Bates*, 26 Ala. 655.

The statements made by the plaintiff to Dr. Jameson, with which we are here concerned, do not appear to have been statements of past events or a narration of past sufferings, but of then existing pain. It is true they were made after the suit was commenced, and it may be said, too, they were not made wholly with a view of receiving medical treatment. It does appear, however, that treatment followed the examination, and so far as appears from the examining physician, the examination was made with that end in view. It may be conceded that statements made during an examination so brought about are not entitled to the weight they otherwise might have. We think they were nevertheless admissible in evidence, not for the purpose of establishing the truth of the statements made, but for the purpose of determining the basis upon which the opinion of the witness was founded. *Barber v. Merriam*, *supra*.

Since the witness was not applied to solely for the purpose of qualifying him to testify as an expert in the plaintiff's behalf, we need not determine the admissibility of statements made to experts in the course of an examination voluntarily applied for after suit commenced, which examination was had with no other purpose in view than that the examining phys-

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ician should thereby become qualified to testify as a witness. That the evidence would be admissible in such a case, is sustained by high authority, and that cases might arise in which such evidence would be admissible in order to prevent a failure of justice and protect the just rights of parties, seems scarcely to admit of doubt. That it should be admitted, if at all, under proper limitations, and subjected to scrutiny when admitted, may be conceded. But it has been held admissible. *State v. Geddicke*, 43 N. J. L. 86; *Kent v. Town of Lincoln*, 32 Vt. 591; *Matteson v. New York Cent. R. R. Co.*, *supra*.

The case of *Grand Rapids, etc., R. R. Co. v. Huntley*, 38 Mich. 537 (31 Am. R. 321), may be said to be in a measure opposed to the admission in evidence of statements made to any other than an attending physician when such statements are made after suit commenced. The case is, however, not opposed to the conclusion at which we have arrived on the facts in this case. Whether we should feel disposed to follow it to the full extent to which some of the reasoning of the learned judge who delivered the opinion might lead, we need not now determine.

At the proper time the court gave an instruction concerning the burden of proof, which is a subject of discussion. The substance of the instruction was, that if the plaintiff had shown by the evidence, that while being carried as a passenger the car in which he was seated was thrown from the track, and he was, without fault on his part, injured, he had thereby established a cause of action, and that, unless the defendant had proved by a preponderance of the evidence that the injuries resulted without any fault on its part, he was entitled to a verdict.

Without regard to whether the instruction complained of was in all respects technically and verbally accurate, since it appears from the answers to the special interrogatories that the jury found that the defendant was, in respect of the matters already alluded to, negligent, the error in the instruction, if there was any, was harmless.

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A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that the instruction complained of was not influential in inducing the verdict. *Worley v. Moore*, 97 Ind. 15; *Hayden v. Souger*, 56 Ind. 42 (26 Am. R. 1); *Bedford, etc., R. R. Co. v. Rainbolt*, *supra*.

Upon the subject of the burden of proof, which has been presented on both sides with great research and ability, it may be proper to say that upon the issue of negligence the burden was, and remained, on the plaintiff throughout the trial. Upon the whole case, it was incumbent on him to establish negligence to the satisfaction of the jury.

When, however, he made it appear in evidence that he was a passenger on the defendant's train, and while being carried as such the car in which he was seated left the track, and that he suffered injury therefrom, he had then shown a state of things upon which a presumption of negligence arose against the defendant. This presumption stood with the force and efficiency of actual proof of the fact, and was available for his benefit until it was negatived and overthrown by proof of other facts.

The necessity or burden was then cast upon the defendant of relieving itself from the presumption of negligence thus raised. This would be done, if it was true that the plaintiff was a passenger on its train and the car had left the track, not by disputing the evidence which the plaintiff offered, but by bringing forward evidence to establish collateral facts in explanation of the immediate cause of the accident, and to show that in the conduct of its business it had employed the utmost skill, prudence and circumspection practically and usually applied to railroad carrying, and that, notwithstanding all that, the cause of the accident was not and could not reasonably have been discovered and guarded against.

Upon each and all of the separate collateral facts which went in explanation of the cause of the accident, and to demon-

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strate its diligence and care in the operation of its trains, and in the maintenance of its track, carriages, machinery and appliances in a condition of safety, the burden was on the defendant. *Thompson Carriers*, pp. 210, 211. The evidence upon all these subjects was within its own control, and presumably all that was available was subject to its command. If these facts were so far proved as to overthrow the presumption of negligence, and no countervailing proof was offered by the plaintiff, its defence was complete. And as the plaintiff had the burden of the issue, the presumption and proof of negligence might have been overthrown if the weight of the explanatory facts proved had risen to such a degree and level as that the jury on the whole evidence could not have found whether the defendant was negligent or not. It is, therefore, not entirely accurate, in a case like this, to say that the burden is on the defendant to prove that it was not negligent, but it is the rule that when an injury occurs to a passenger under like circumstances, a presumption of negligence arises which can only be overthrown by proof that it resulted from inevitable or unavoidable accident, against which no human skill, prudence or foresight, as usually and practically applied to careful railroad management, could provide. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551, and cases cited; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168); *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462; *Cleveland, etc., R. W. Co. v. Newell*, 75 Ind. 542; *Seybolt v. New York, etc., R. R. Co.*, 95 N. Y. 562 (47 Am. R. 75); *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Edgerton v. New York, etc., R. R. Co.*, 39 N. Y. 227; *Lamb v. Camden, etc., R. R. Co.*, 46 N. Y. 271 (7 Am. R. 327); *Bates v. Prickett*, 5 Ind. 22; *Adams v. Slate*, 87 Ind. 573; *Fay v. Burditt*, 81 Ind. 433 (42 Am. R. 142); *Carver v. Carver*, 97 Ind. 497; *McDougal v. State*, 88 Ind. 24.

What has been said disposes of the instructions given, and those tendered and refused, which relate to the subject of the

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burden of proof, and the degree of diligence required of the defendant.

As before remarked, there was evidence tending to show that the accident was caused by the breaking of a rail, and that another rail had been broken shortly before at the same place as that at which the accident occurred.

As relevant to this evidence the court gave an instruction, to the effect that if the jury found from the evidence that the broken rail which caused the car to leave the track had been put down in the place of another, which had broken the same morning at exactly the same place, they might take this fact into consideration in determining whether the rail which broke was a good rail, and whether it was properly and carefully put down.

The defendant requested an instruction presenting substantially the opposite view. Giving the one and refusing the other are now made grounds upon which a reversal is insisted.

In support of their position appellant's counsel argue, and support their position by authority, that in an action which involves the question of negligence, it is not competent to prove other disconnected, though similar, acts of negligence, for the purpose of raising a presumption of negligence in the case in question. 1 Whart. Ev., section 40; *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294 (10 Am. R. 111); *Pierce Railroads*, p. 293.

Conceding the rule as contended for, when applied to the proposition as stated, we are nevertheless of the opinion that the point is not well made in this case. One important object in the investigation here was to ascertain the condition in which the defendant's track and roadway were at the time and place the accident occurred. It was likewise important to determine whether anything had occurred which should have attracted the notice or attention of the company to that place.

Assuming that a good rail properly adjusted in the track upon a suitable roadway would not break, then the fact that

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a number of such rails, so adjusted, had broken in quick succession at the same place, would tend to invite attention to that place, and also to raise an inference that the roadway was defective. This inference would be strong or weak, in proportion to the number and rapidity of such occurrences. But whether strong or weak, it was competent to be considered for what it was worth.

In the case of *Morse v. Minneapolis, etc., R. W. Co.*, 30 Minn. 465, it was held, in an action to recover damages for an injury caused by an accident resulting from a broken rail and defective switch, that it was error to admit evidence of defects at other places in the road, but for the purpose of showing the defective character of the switch at the point where the accident occurred, the plaintiff was permitted to show that other engines missed the track at the same place both before and after the accident, while the switch remained in substantially the same condition. In that case the court said: "Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the use for which it was designed, would seem to bear directly upon the issue."

We think that the instruction was fully justified under the ruling in *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98), and the cases there cited, and that it was proper for the jury to consider the fact of the successive breaking of rails at the same place within so short a time, both to indicate the condition of the track and roadway at that point, and that the defendant had notice of any probable defect. This conclusion is not in conflict with the ruling in *Ramsey v. Rushville, etc., G. R. Co.*, 81 Ind. 394.

What has been said in respect to the instructions and of their effect in reaching the result arrived at by the jury, as indicated by the special findings, disposes of all questions relating to instructions given or refused, except the question made upon instruction No. 12, which relates to the assessment of plaintiff's damages.

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In this instruction the jury were told that, in assessing the plaintiff's damages, they might consider the pain which he had suffered or was likely to suffer, the value of time lost, or which was likely to be lost by reason of the injury, whether such injury was likely to be permanent or not, whether the plaintiff was likely to remain an invalid or get better or worse, and, upon a consideration of all the facts proved, ascertain the extent of the injury and award such damages as in their judgment would compensate, so far as money can, for such injury.

The objection urged against this instruction is, that it assumes the existence of many facts in dispute; that it authorizes the implication that the plaintiff could not be fully compensated in damages, and that for these reasons it was an invasion by the court of the province of the jury.

In estimating the pecuniary loss or damages, in a case like this, the jury is not limited to past pain and suffering and to the time already lost. They may take into consideration all the consequences of the injury, future as well as past, when the proof before them renders it reasonably certain that future loss and suffering are inevitable. *Town of Elkhart v. Ritter*, 66 Ind. 136.

As the elements of damage recited by the court were all proper to be considered, and as the damages were to be ascertained and awarded upon a consideration of all the facts proved, we think the instruction can not be considered as having invaded the functions of the jury, nor must it be assumed that the jury were diverted from considering the facts proved, as the basis upon which to predicate the amount of compensation to be awarded, by what was, at most, an irrelevant suggestion from the court.

Having thus examined all the questions presented, and finding no error in the record, the judgment is affirmed, with costs.

Filed Dec. 12, 1885.

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No. 12,288.

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104	278
148	89
148	113

104	278
165	590

PROMISSORY NOTE.—Commercial Paper.—Time of Payment.—Provision in Note for Extension.—A note, although payable in a bank in this State twelve months after date, is not negotiable as an inland bill of exchange when it contains a provision that "the payee or his assigns may extend the time of payment from time to time indefinitely, as he or they may see fit," as the time of payment is not certain and unconditional; and in an action on such note defences may be made as in actions on other non-negotiable paper.

SAME.—Plea in Abatement.—Practice.—The defence of an extension of time of payment of a promissory note should be made as a plea in abatement, and under the statute (section 365, R. S. 1881,) it can not be pleaded with, but must precede, an answer in bar.

From the Henry Circuit Court.

J. H. Mellett and E. H. Bundy, for appellant.

J. M. Morris, for appellee.

ZOLLARS, J.—For value and before maturity, appellee became the owner of two promissory notes, executed by appellant, one of which is as follows:

"\$750. NEWCASTLE, IND., April 14, 1883.

"Twelve months after date we, or either of us, promise to pay to the order of George W. Nugen, Jr., seven hundred and fifty dollars, with interest at the rate of seven per cent. per annum after date until paid, and attorney fees, value received, without any relief whatever from valuation or appraisement laws, with eight per cent. interest from maturity. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note; and further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit, and receive interest in advance, or otherwise, from the maker or endorsers, for any extension or forbearance so made. Negotiable and payable at the Citizens' State Bank of Newcastle.

"J. W. GLIDDEN."

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So far as is material here, the other note is the same. Appellee brought this action to recover the amount of the notes, and to foreclose the mortgage given by appellant to secure them.

The questions for decision are presented by the ruling of the court below in sustaining a demurrer to appellant's answers, and the assignment here that that ruling was erroneous.

If the notes are negotiable as inland bills of exchange, the demurrer was properly sustained, because the defences set up in the answers are such as can not be made as against the *bona fide* holder of such paper. We are, therefore, met at the threshold with the question, are these notes negotiable as inland bills of exchange? In section 5506, R. S. 1881, it is provided that "Notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover, as in case of such bills."

This statute does not provide what shall constitute a promissory note. The term "note" is used, as it was then and still is defined by the authorities, and well understood under the law merchant in the commercial world. *Melton v. Gibson*, 97 Ind. 158.

The sole purpose of the section was to put a limitation upon section 5503, and provide for commercial paper that might circulate free from defences in favor of the maker. This is accomplished by the provision, that if the note be payable at a bank in this State, it shall be negotiable as inland bills of exchange.

The note, then, with the addition prescribed by the statute, must be such as would have been negotiable under the law merchant without any statutory provision. Are the notes in suit such as would have been thus negotiable? A standard author has said: "To learn what qualities are essential to a negotiable promissory note, we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the

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work of money in business transactions. For this purpose, the first requisite, that, indeed, which includes all the rest, is *certainty*. This means certainty, * * * Second, as to the person or persons who are to make this payment, and the order and conditions of their liability. * * * Fourth, as to the time when payment is to be made. * * * It will be seen that the law endeavors to enforce, define, and protect all these certainties as far as possible." 1 Parsons Notes and Bills, p. 30. See, also, 1 Daniel Neg. Inst., section 41. This same general doctrine of the books is recognized by this and all other courts. *Walker v. Woollen*, 54 Ind. 164 (23 Am. R. 639). In this case it was said: "A note, in order that it be negotiable in accordance with the law merchant, must be payable unconditionally and at all events, and at some fixed period of time, or upon some event which must inevitably happen."

Were it necessary, we might cite numerous decisions by this court asserting the general doctrine of certainty as necessary to a promissory note under the law merchant. The difficulty is not as to the general doctrine, but the application of it to each case as it arises.

In the case before us, all parts of the note must be looked to in determining the quality of the paper. There is a promise to pay in twelve months, but that promise is not certain and unconditional. The other clause is, that the time of payment may be extended indefinitely, as the parties may agree. From an inspection of the note, it is impossible to tell when it may mature, because it is impossible to know what extension may have been, or may hereafter be, agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is not that something may happen, or be done, that will mature the note before the time named, thus leaving that time as fixed and certain, if the thing do not happen, or be not done; but the condition is that the time named may be displaced by another, uncertain and indefinite time, as the parties may agree.

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This distinguishes the case from some of the cases cited by appellee, which hold that so long as a definite time of payment, as fixed in the note, remains fixed and certain, the note retains its negotiability, although by certain agreed conditions it may be matured before that time. The case here is, also, distinguishable from another class of cases which hold that the time of payment may be dependent upon an event that must inevitably happen, such as the death of the maker, the coming of the seasons, etc. The precise question involved here has been passed upon by the Supreme Courts of Iowa and Michigan, and in each case it was held that the condition destroyed the negotiability of the note. *Woodbury v. Roberts*, 59 Iowa, 348 (44 Am. R. 685); *Smith v. Van Blarcom*, 45 Mich. 371. See, also, as in point, *Cook v. Satterlee*, 6 Cow. 108; *Gillilan v. Myers*, 31 Ill. 525; *Costelo v. Crowell*, 127 Mass. 293 (34 Am. R. 367).

We conclude from the foregoing that the notes in suit are not negotiable under the statute as inland bills of exchange, and that, therefore, whatever defences appellant might have set up and made available as against Nugen, the payee, he may set up and make available as against appellee.

Appellee concedes that the first answer is sufficient if the notes in his hands are subject to defences by appellant. A holding, therefore, that the notes are thus subject to defences, is a holding that the court below erred in sustaining the demurrer to all of the answers.

Appellant's counsel have directed the whole of their argument to the proposition that the notes are open to defences, and have said nothing in support of the answers. The first answer is clearly good, as it sets up an entire want of consideration for the notes.

For the sustaining of the demurrer to this answer the judgment must be reversed. There is nothing in the notes, nor in the mortgage, that can operate as an estoppel against appellant to make this defence.

As there is no discussion of the other answers, we observe,

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simply, that the second answer, setting up an extension of the time of payment, is not good as a plea in bar. If such an extension may be made available, as we think it may be in this case, it should be brought forward as a plea in abatement. And under our present statute, section 365, R. S. 1881, such an answer must precede, and can not be pleaded with, an answer in bar.

As to the third answer, in which there was an attempt to make available as a defence the fact that Nugen was not the owner of an undivided one-third of the land covered by the mortgage, it is sufficient to say that the plea does not make a defence, either upon the ground of fraud or upon the ground that there was a breach of warranty.

The judgment is reversed, with costs.

Filed May 26, 1885; petition for a rehearing withdrawn Dec. 29, 1885.

No. 12,167.

COCHRAN v. AMSDEN, GUARDIAN.

WITNESS.—*Contradictory Statements.*—Expressions of opinion out of court different from that on the witness stand may be proved as affecting the credibility of the witness.

INSANE PERSON.—*Proceeding to Set Aside Guardianship.*—*Issue.*—In a proceeding under the statute, R. S. 1881, section 2553, to set aside the guardianship of an insane person, the question to be decided is, whether the person previously adjudged insane has so far regained his reason as to be capable of managing his estate.

SAME.—*When Guardianship Continued.*—If a person under guardianship as an insane person is not so far restored to reason as to be capable of understanding the ordinary affairs of life, the guardianship should be continued.

SAME.—*Instruction.*—*Form of Verdict.*—In such case, it is proper to instruct the jury, as to the form of their verdict, that if they find for the plaintiff their finding should be that the person under guardianship is of sound mind and capable of managing his estate, and if against the

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plaintiff, that such person is of unsound mind and incapable of managing his estate.

SAME.—Issues.—Judgment.—A verdict reading, "We, the jury, find that E. C. is a person of unsound mind and incapable of managing her estate," is responsive to the issues and covers the entire case; and judgment thereon, continuing E. C. under guardianship, is proper.

SAME.—Costs Taxed to Plaintiff When Proceeding is Unsuccessful.—Where a proceeding to set aside the guardianship of an insane person is unsuccessful, the costs should be taxed to the plaintiff, and not to the guardian or estate of the insane person.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.
B. F. Love, A. Major and H. C. Morrison, for appellee.

ELLIOTT, J.—The appellant in his petition alleges that Elizabeth Clayton was adjudged to be a person of unsound mind on the 11th day of April, 1884, and that her reason has been restored. Prayer that her disability might be removed, and that she be declared a person of sound mind. A trial by jury resulted in a verdict against the petitioner, upon which judgment was pronounced.

There was no error in permitting the appellee to prove that Daniel Cochran, a witness called by the appellant, had expressed, out of court, an opinion different from that expressed on the witness stand. If a witness has expressed contradictory opinions, that fact goes to his credibility as a witness, and also supplies grounds for distrusting his ability to form a correct opinion. *Rogers Expert Testimony*, 51.

The court gave an instruction containing the following statement: "The sole question submitted for your consideration is: Is Elizabeth Clayton now a person of sound mind and capable of managing her own estate?" We regard this as a correct statement of the question which the jury were to decide. The object of an inquiry as to the mental condition of a person alleged to be of unsound mind is to ascertain whether it is or is not proper to appoint a guardian, and, in order to determine this question, it must be ascertained

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whether the insane person is capable of managing his estate. The statute does not contemplate the holding of the inquest for a mere general purpose, but intends that it shall be held for a specific purpose, and that purpose is, to ascertain whether it is or is not proper to appoint a guardian. As this is the purpose of the statute, it follows that when it is sought to set aside the guardianship, the controlling question is, whether the person previously declared insane is capable of managing his estate. If he is, the guardian should be removed; if he is not, the guardian should be continued in office. We are well satisfied that the purpose of the statute in providing for such a proceeding as the present is to enable the court to determine whether the person previously adjudged to be of unsound mind has so far regained his reason as to be capable of managing his own estate. To hold otherwise would defeat the plain intention of the Legislature and make the statute of no practical benefit. The language employed by the Legislature will not warrant any other conclusion than the one we have announced. R. S. 1881, sections 2553, 2545.

The instruction of the court as to the form of the verdict was correct. It was proper for the jury, if they found for the petitioner, to state that Elizabeth Clayton was of sound mind and capable of managing her estate, and if they found against the petitioner, it was proper for them to state that she was of unsound mind and incapable of managing her estate. It was proper to indicate the character of the mental incapacity, for it is not every person with impaired mental powers that can be declared incapable of managing his estate, nor is it every person whose mind is impaired, although he has some mental power, that is capable of managing his business affairs.

The decision in *In Re Carmichael*, 36 Ala. 616, relied upon by appellant's counsel, lends them no support; on the contrary, it is directly and strongly against them. What that case decides is, that it is improper to ask a witness his opinion as to whether the person whose mental capacity is under in-

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vestigation is capable of managing his affairs, and the reason for that ruling is, that the question is for the jury. As decided in *Walker v. Walker*, 34 Ala. 469, that question is always for the jury, and it is upon the case just named that the case relied on by counsel is founded.

If a person under guardianship as an insane person is not so far restored to reason as to be capable of understanding the ordinary affairs of life, the guardianship should not be discontinued. It is not easy to perceive how it can be affirmed with any fair degree of plausibility, that a woman who can not understand the ordinary affairs of life is restored to reason and capable of managing her own estate. We can not concur in the views of appellant's counsel upon this question, nor can we grant that the cases of *Stubbs v. Houston*, 33 Ala. 555, *Kinne v. Kinne*, 9 Conn. 102, and *Potts v. House*, 6 Ga. 324, exert any influence upon the question. These cases decide what constitutes testamentary capacity, and it is a familiar rule that the question in such cases is very different from that in cases where the power to contract is involved. Our conclusion is sustained by *Somers v. Pumphrey*, 24 Ind. 231; *Darnell v. Rowland*, 30 Ind. 342. Counsel in endeavoring to parry the force of these cases say, that the rule there declared applies to contracts, and not to cases of this character, but counsel forget that the capacity to manage an estate necessarily implies the power to contract. There would be no tincture of reason in a rule that affirms that a person so mentally diseased as not to be able to make contracts is, nevertheless, capable of managing his own estate.

The verdict returned in this case reads thus: "We, the jury, find that Elizabeth Clayton is a person of unsound mind and incapable of managing her estate." The appellant urges that this verdict is insufficient, and that the trial court erred in overruling the motion for a *venire de novo*. We can not concur with counsel in their criticisms upon this verdict, for we regard it as responsive to the issues, and as covering the

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entire case. The cases we have referred to show that it was proper for the jury to find upon the question of the capacity of Elizabeth Clayton to manage her estate.

It was the duty of the court to pronounce the judgment upon this verdict, that Elizabeth Clayton was not of sound mind and was incapable of managing her estate. Neither reason nor authority lends the slightest support to the contention of counsel that the court had no right to pronounce such a judgment.

The only question in the case that is at all difficult is that arising upon the ruling of the trial court sustaining appellee's motion to tax the costs against the appellant. We are of the opinion that this ruling was right. The general theory of the law is that a plaintiff who institutes a suit must pay costs if he does not succeed. Where there is no statute changing this general rule, it must prevail, and we do not think the statute relied on by the appellant does make any change. It would serve no useful purpose to set out and comment upon the provisions of the statute, and we deem it sufficient to say that the statute does not intend that the costs of such a proceeding as this should be paid by the guardian, or paid out of the estate in a case, where the petitioner is not successful. We regard section 2553 as providing for the payment of costs out of the estate only when the judgment is that there has been a restoration of reason. This is the only construction that will give the last clause of that section a reasonable effect, harmonize all the provisions of the statute, and bring them into uniformity with the general rule that the unsuccessful party must pay costs. *Galbreath v. Black*, 89 Ind. 300.

Judgment affirmed.

Filed Dec. 18, 1885.

The State, *ex rel.* Neff, *v.* Faurote.

No. 12,334.

THE STATE, *EX REL.* NEFF, *v.* FAUROUTE.

104	287
136	618
104	287
163	6

PRACTICE.—*Demurrer to Paragraphs of Answer Jointly.*—A demurrer to several paragraphs of answer jointly will be properly overruled if one paragraph is good.

SUPREME COURT.—*Assignment of Error.*—The Supreme Court will not consider any question which is not fairly presented by the assignment of errors.

From the Henry Circuit Court.

D. S. Morgan, S. S. Harrell, C. S. Hernly and S. H. Brown,
for appellant.

J. A. New and J. W. Jones, for appellee.

Howk, J.—The relator of the appellant, the plaintiff below, has assigned the following error upon the record of this cause, namely :

“The court erred in overruling plaintiff’s (appellant’s) demurrer to the first, second, third, fourth, fifth, sixth and seventh paragraphs of the separate answer of the appellees herein, David M. Brown, John B. Guerin, William H. Lewis, John H. Craynor, George B. Morris, Daniel B. Canaday and Frank J. Hall.”

This assignment of error is joint as to all the paragraphs of answer enumerated therein. It does not call in question the sufficiency or insufficiency of any one of the several paragraphs of answer. But it presents for our decision this single question: Did the trial court err in overruling appellant’s demurrer to all the enumerated paragraphs of answer, as an entirety? If all of such paragraphs were bad, the court clearly erred in overruling the demurrer thereto, and the error quoted is well assigned, and the judgment below must be reversed. But if any one or more of such paragraphs of answer were sufficient to withstand the relator’s demurrer, it is equally clear that the ruling assigned here as error is not well assigned, and the judgment below must be affirmed. This is so even though some of the paragraphs of answer, if consid-

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ered separately, might seem to be clearly insufficient. *Ketcham v. Barbour*, 102 Ind. 576.

It is certain that the court committed no error in the ruling complained of in appellant's assignment of error, because paragraphs three and four of appellees' answer were sufficient, beyond all room for doubt, to withstand the demurrer thereto for the want of facts. Paragraph three of such answer was a general denial of each and every allegation in the relator's complaint; and in paragraph four the appellees alleged that the relator's claim "was fully paid and satisfied long before the institution of this cause." These two of the seven paragraphs of appellees' answer were good on demurrer, and, therefore, the ruling of which appellant complains in the assignment of error above quoted was clearly right, and the judgment below must be affirmed.

If the record of this cause clearly showed that appellant had separately demurred to each of the seven paragraphs of appellees' answer, and that, as to some of such paragraphs, the separate demurrers had been erroneously overruled, such erroneous rulings would not be available to appellant's relator, for the reversal of the judgment below, simply because he has not assigned such rulings here as errors. It is settled by our decisions that the appellant's assignment of errors constitutes his complaint in this court, and that, to the errors there assigned, the appellee is only required to answer, either in pleading or in argument. We have often held that the assignment of errors is the foundation of the appellant's proceedings here for the reversal of the judgment below, and that we will neither consider nor decide any question which is not fairly presented by the assignment of errors. *Hartlep v. Cole*, 94 Ind. 513; *Ketcham v. Barbour*, *supra*; *Indiana, etc., R. W. Co. v. Maddy*, 103 Ind. 200.

The judgment is affirmed, with costs.

Filed Dec. 29, 1885.

Sample v. The State.

No. 12,386.

SAMPLE v. THE STATE.

CRIMINAL LAW.—*Affidavit.*—*Immaterial Uncertainty.*—*Practice.*—Overruling a motion to quash an affidavit charging a malicious injury of property, will not authorize the reversal of the judgment, where the only defect is immaterial uncertainty. Section 1891, R. S. 1881.

SAME.—*Malicious Trespass.*—*Value of Property.*—*Damage.*—In an affidavit for the malicious injury of property, it is only necessary to charge the amount of the damage to the property or its owner. The value of the property need not be stated.

SAME.—*Written Instructions to Jury.*—*Oral Statement.*—Where the court is requested to instruct the jury in writing, and the defendant asks that certain instructions be given, it is not reversible error, no harm being shown, for the court to state orally to the jury that "defendant's counsel have asked me to give the following instructions."

From the Hancock Circuit Court.

J. A. New and J. W. Jones, for appellant.

F. T. Hord, Attorney General, and W. B. Hord, for the State.

MITCHELL, J.—The appellant was prosecuted for maliciously injuring property. After laying the venue, it is charged in the affidavit that, on a date mentioned, the defendant did "unlawfully and maliciously injure a certain milch cow, the property of Ira Bevil then and there being, and there unlawfully and maliciously running, striking and beating said cow with a whip, stick and club," etc.

The appellant insists that the gravamen of the charge is, that the cow was "unlawfully and maliciously running," etc. We think, however, that the fair import of the charge is, that the defendant injured the cow, by then and there unlawfully and maliciously running, striking and beating "*said cow*," etc.

While there is some confusion in the language employed in describing the particular manner in which the injury was inflicted, it is certain that it is sufficiently charged that the

Sample v. The State.

defendant did unlawfully and maliciously injure a certain milch cow, the property of the prosecuting witness, and that the injury was inflicted by striking and beating the cow in the manner described.

Under a statute which requires this court to disregard mere technical errors and defects which do not prejudice the substantial rights of the defendant, we should not feel authorized to reverse the ruling of the court in refusing to quash the affidavit for the supposed uncertainty alluded to. Section 1891, R. S. 1881.

It is also made a ground of objection that the value of the property injured is not stated in the affidavit. We think it is only necessary to charge the amount of the damage done to the property or its owner in consequence of the injury to it. *State v. Sparks*, 60 Ind. 298; *State v. Pitzer*, 62 Ind. 362. The point was made and decided adversely to the appellant in the case of *Kinsman v. State*, 77 Ind. 132.

At the proper time counsel for the appellant requested that the court should instruct the jury in writing. Certain written instructions were also presented to the court with the request that they be given to the jury. The instructions so asked by the defendant were given, the court prefacing the reading of them to the jury with the following oral statement: "Gentlemen, defendant's counsel have asked me to give the following instructions." This oral statement was excepted to, and it is now insisted that the judgment ought to be reversed because the court made it. The making of such statements—doubtless through inadvertence—is a practice not to be commended. The habit was commented upon and disapproved in *Dodd v. Moore*, 91 Ind. 522. To what was there said nothing need be added, except to say that in a doubtful case such a suggestion might require a reversal of the judgment.

As the oral statement was not, and did not purport to be, any part of the charge of the court to the jury, it did not

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violate the rule which requires the court to instruct in writing when so requested, and in the absence of anything to indicate that the verdict was not well supported by the evidence, or that the appellant was possibly prejudiced by the remark, it can not be made ground for reversal.

The judgment is affirmed, with costs.

Filed Dec. 30, 1885.

104 291
160 212

 No. 12,224.

SINKER v. FLOYD ET AL.

REAL ESTATE.—*Action for Breach of Covenants in Deed.*—*Real Party in Interest.*—An action for a breach of covenants contained in a deed must be brought by the real party in interest, viz., the person entitled to the money recovered as damages.

PLEADING.—*Complaint.*—*Cause of Action.*—*Demurrer.*—Where the face of a complaint shows a cause of action in a third person, and not in the plaintiff, it is bad on demurrer for want of facts.

From the Decatur Circuit Court.

J. W. Study and *A. B. Young*, for appellant.

J. D. Miller and *F. E. Gavin*, for appellees.

ELLIOTT, J.—The appellant, Alfred T. Sinker, avers in his complaint that he sues for the use of Sarah A. Coates, and alleges that Mrs. Coates has sustained damages from a breach of the covenants contained in a deed executed to him by the appellees. It is also alleged that Mrs. Coates received from the appellant a deed, with full covenants, for the same land as that described in the deed executed by the appellees.

The position of the appellees' counsel is, that the complaint shows on its face that Sarah A. Coates is the real party in interest, and that, as the cause of action is in her, the appellant can not recover. The appellant's counsel contend that

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the action may be prosecuted by the immediate grantor for the benefit of his grantee.

We are satisfied that under our code an action for a breach of covenant must be prosecuted in the name of the real party in interest, and that the real party in interest is the person entitled to the money recovered as damages. It is plain that Mrs. Coates, and not Mr. Sinker, is the person entitled to the damages resulting from a breach of the covenants in the deed executed by the appellees. The latter has suffered no loss, and is entitled to no damages, for he has sustained no injury.

Where the face of the complaint shows a cause of action in a third person, and not in the plaintiff, it is bad, because it does not state facts sufficient to constitute a cause of action. *Pence v. Aughe*, 101 Ind. 317. It seems quite clear to us that a plaintiff, who shows by the allegations of his pleading that the right of recovery is in another, can not maintain an action. This is the case here, for it affirmatively appears that Mrs. Coates, and not Mr. Sinker, is the only party entitled to recover, as she is the only person who has sustained a loss or suffered an injury.

We need not discuss the question whether Mrs. Coates, as a remote grantee, can maintain an action for the breach of the covenant of seizin, but it is not improper to refer to our decisions upon that question. *Dehority v. Wright*, 101 Ind. 382; *Wright v. Nipple*, 92 Ind. 310; *Wilson v. Peelle*, 78 Ind. 384; *Coleman v. Lyman*, 42 Ind. 289.

Judgment affirmed.

Filed Dec. 19, 1885.

The Lake Shore and Michigan Southern Railway Company v. Foster.

No. 11,529.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY
COMPANY v. FOSTER.

104	293
127	150
104	293
121	38
104	293
125	520
104	293
123	638

DEMURRER TO EVIDENCE.—A demurrer to the evidence admits all facts which the evidence adduced by the adverse party tends to prove, or of which there is any evidence however slight, and all inferences which can be logically and reasonably drawn from the evidence.

SAME.—Evidence adduced by the party demurring will not be considered, as by demurring he withdraws from the consideration of the court all evidence offered by him.

SAME.—In passing upon the evidence demurred to, the court will not attempt to reconcile conflicts, and hence will not consider such evidence as is favorable to the demurring party, if there be any opposing evidence upon the same question of fact; neither will it weigh evidence to determine whether any particular fact is established, but will take as true every fact of which there is any evidence.

SAME.—If the plaintiff call several witnesses to prove the same transaction, some of whom testify unfavorably to him, and others in his favor, the defendant by demurring to the evidence admits that the latter have told the truth, and so the court must take it though the jury might have believed the former.

SAME.—On a demurrer to the evidence, forced and violent inferences are not admitted, but only such as a jury might draw, or which may be reasonably drawn, from the admitted facts.

COMMON CARRIER.—*Liability for Baggage.*—*Rules of Company.*—A rule by a railway company, that a person, intending to become a passenger, shall purchase a ticket or pay fare before the company receives and becomes responsible for his baggage, is a reasonable regulation, but if no such rule is adopted, or, being adopted, is not observed by its agents, or, if notwithstanding such rule, a trunk is received as baggage, trusting to the honesty of the owner to purchase a ticket or passage upon the train upon which the trunk is to go, such company will be liable for its loss to an owner who has acted in good faith, whether such loss occurred before or after the arrival and departure of the train, or before or after the purchase of a ticket or the payment of fare.

SAME.—*Agent.*—*Notice to Third Person.*—Where a baggageman is the agent of a railway company, with general authority to receive the baggage of persons intending to go upon the company's train, and does receive baggage in violation of the rules and regulations of the company, the latter will be liable for the loss of such baggage to the owner who has delivered the same in good faith within a reasonable time before the departure of the train, unless the existence of such rules is brought to the knowledge of such owner.

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SAME.—Restrictions upon Agent's Authority.—Restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them on inquiry as to the extent of his actual authority.

From the Elkhart Circuit Court.

A. Pond and *O. G. Getzendanner*, for appellant.

H. C. Dodge, for appellee.

ZOLLARS, J.—Appellee brought this action to recover the value of a trunk and its contents. Her counsel concede that the evidence in the case is correctly set out in appellant's brief. As there set out it is as follows, except some immaterial omissions :

Mary Foster, the plaintiff, testified :

"On the 17th day of November, 1882, I was going to Chicago on a visit, and on the evening before tried to find a man to take my trunk to the depot. I met Mel Quimby, and he said he would send a man. Will Spicer came to take my trunk. I told him to take it to the depot and tell the baggageman that I was going off on No. 5 the next morning. He is expressman for Mr. McGowan. I delivered the trunk to Will Spicer, the expressman, about half-past 9 o'clock on the evening of the 16th of November, 1882. I was to go off at 4:25 the next morning. The next morning when I got my ticket I went to the baggageman in the baggage-room and asked for my trunk. He said 'which one of these trunks is yours?' I said 'none of them.' I asked Mr. Quimby the evening before to get the trunk checked. Mr. Wilcox said he did not know where my trunk was, that he had not seen it since immediately after the departure of No. 6 the night before, and that there had been baggage stolen there before from the platform. He said, we do not take in baggage unless it is checked. I had sent my trunk down once before when I went east, and found it was all right. I had my wearing apparel in the trunk—an overskirt and dress worth \$40; a green dress worth \$5; a dress skirt worth \$1; a hat \$7.50; oil paintings \$9; gold cross \$5; jewelry \$12; shawl \$3.50;

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table spread and napkins \$3.15; handkerchiefs and ties \$2; a small gold watch \$15; and other articles I did not remember when I gave Mr. Dodge the list, but have missed since. When I did not find my trunk I went back home, and did not go to see anybody, until about 7 o'clock I called at Colonel Tucker's office to see about it. Mr. Tucker said he would see that it was all made right, and would hunt it up for me. After buying the ticket I called for my trunk, but did not get it. I got it the next afternoon, with two articles in it, and they were spoiled. Marshal Miller brought it to me. I have never been paid for those goods. The total value is \$125."

William Spicer, being called on behalf of the plaintiff, testified as follows:

"I live at Elkhart. Mr. Quimby saw me at the depot and asked if I would go and get a trunk up at Hayden's barber shop, and I went. Miss Foster gave me the trunk and told me to take it to the depot, and I did. I put it where Quimby told me. He said 'put it down there under the eaves, in the dry.' It was raining. I did so and went off. I put it down under the eaves of the depot building, near the baggage-room door. The baggageman was not there. I have not hauled baggage long—only about a month. I deliver baggage to and from every train from the hotels. Sometimes we put it on the platform and under the eaves. I was not acquainted with Mr. Wilcox. I knew the baggageman when I saw him. He would take baggage when the owners came to get it checked. He would not take it until owners came to get it checked."

Mel Quimby, being called in behalf of the plaintiff, testified as follows:

"On the evening of November 16th, 1882, it was raining. I was going to Chicago on No. 5 the next morning. I met Miss Foster and walked up street with her. I said to her, 'I am going to Chicago in the morning,' and said I must go and get my trunk checked. She said she was going, too, and asked me to get hers checked, too. I employed Spicer to get her

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trunk and bring it to the depot. He went after the trunk with a truck. I was there when he came with it. I said to Spicer, 'Dump it right down here near the baggage-room door, under the eaves, in the dry.' I went to reach for the door and Mr. Wilcox stepped out. He is the baggageman. I had started to open the baggage-room door. I said to Wilcox, 'Here is a trunk for No. 5, put it in the baggage-room.' He said 'No, leave it out there, it will be all right.' This was about half-past 9 o'clock. It was Miss Foster's trunk."

Henry Wilcox, being called on behalf of the plaintiff, testified as follows:

"I live in Elkhart. On November 16th I was employed in checking baggage. I was the night baggageman. I receive baggage for the company when a ticket is presented, and then give a check for it, but not without. Quimby called my attention to the matter of the trunk the next morning, but not that night. He asked me the next morning whether I saw the trunk. I did not see Quimby at all the night before, and he did not call my attention to any trunk the night before. I did not tell him to leave it there. I did not know he left a trunk on the platform."

On cross-examination:

"My duty was to receive baggage of passengers when they had tickets. I received baggage when persons had tickets, but not otherwise. I received trunks at the baggage-room door, if persons were going away at once on the train; otherwise in the room only—when they got tickets and their trunks checked, and not otherwise. When baggage is put in the room unchecked, it is at their own responsibility, and persons are told so. Quimby never called my attention to any trunk that night. I did not see him that night. Saw him in the morning when he was going off on No. 5. He came to get his trunk checked. He and Miss Foster asked about her trunk. I told them I didn't know anything about her trunk. Mr. Quimby did not claim that he called my attention to the trunk the night before, and never said anything about the

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trunk being there the night before. I never saw the trunk. It never was delivered to me, nor my attention called to it."

On re-direct examination:

"I said to Quimby and Miss Foster the next morning that I saw a trunk the night before, after No. 6 left, sitting about eight feet from the baggage-room door, under the eaves, but that I did not know whose it was. I locked up the baggage-room when I left. I saw a trunk sitting there, but I did not know whose it was."

Re-cross examination.

"Trunks are often left sitting there on the platform soon after trains arrive or just before they depart, but I pay no attention to them until they are pointed out to me by some one who wants them checked. The principal baggageman is Mr. Barbour. His assistant is Mr. Hockman. I am night baggageman. No one called my attention to the trunk the night before when it was left there."

Re-direct:

"I was discharged by the company soon after the loss of the trunk. I did not understand why. Heard it was something about the police duty. I was re-employed again."

C. W. Green testified on behalf of the plaintiff as follows:

"I am the station agent of the Lake Shore and Michigan Southern Railway Company at Elkhart, and have charge of the company's business there. Mr. Wilcox was the night baggageman for the Lake Shore and Michigan Southern Railway Company at Elkhart, Indiana, on November 16th, 1882. The baggage-room in which Mr. Wilcox worked was the baggage-room of the Lake Shore and Michigan Southern Railway Company. He had authority to receive and check the baggage of passengers. The Lake Shore and Michigan Railway Company is an incorporated company, I suppose, and is engaged in carrying passengers in and through the county of Elkhart and State of Indiana."

On cross-examination:

"The baggageman has no authority to receive baggage ex-

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cept on presentation of a ticket, showing the destination of the owner, then the baggage is checked and received by the company. The company takes no charge of it until it is presented to the agent and checked. It would be impossible to do it otherwise. The company could not look after trunks that persons leave on the platform, and it never does so until they are placed in charge of the baggageman and checked. It occurs frequently that trunks are left on the platform by parties, but the baggagemen pay no attention to them until they are presented to them to be checked."

Appellant demurred to the evidence. The court overruled the demurrer, and rendered judgment for appellee. Appellant prosecutes this appeal and insists upon a reversal of the judgment upon the grounds:

First. There is no evidence that the trunk was ever delivered to or received by the appellant or its agent.

Second. There is no evidence that the appellant's agent had any authority to receive the trunk in the absence of the appellee, and in advance of the time when she proposed to become a passenger on its train.

Third. The evidence introduced by the appellee shows affirmatively that the appellant's agent had no authority to receive the trunk in the manner it was received by him.

It should be remembered at the outset, that the case must be disposed of upon the demurrer to the evidence. So far as the questions have been presented, this court has, upon ample authority, laid down the following rules to be applied in passing upon such a demurrer:

First. A demurrer to the evidence admits all facts which the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence. *Lindley v. Kelley*, 42 Ind. 294; *Newhouse v. Clark*, 60 Ind. 172; *Griggs v. Seeley*, 8 Ind. 264; *City of Indianapolis v. Lawyer*, 38 Ind. 348; *Eagan v. Downing*, 55 Ind. 65; *Pinnell v. Stringer*, 59 Ind. 555; *Thomas v. Ruddell*, 66 Ind. 326; *Atherton v. Su-*

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gar Creek, etc., T. P. Co., 67 Ind. 334; *Miller v. Porter*, 71 Ind. 521; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Nordyke, etc., Co. v. Van-Sant*, 99 Ind. 188; *Kincaid v. Nicely*, 90 Ind. 403; *Hagenbuck v. McClaskey*, 81 Ind. 577.

Second. The above rule has reference to the evidence of the party adverse to the party who files the demurrer. The evidence adduced by the party demurring will not be considered. By demurring, he withdraws from the consideration of the court all evidence offered by him, admits as true whatever facts the evidence adduced by the adversary tends to prove, and all reasonable inferences to be drawn therefrom, and asks for a decision of the law upon such admitted facts. *Fritz v. Clark*, 80 Ind. 591; *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Plant v. Edwards*, 85 Ind. 588; *Ruddell v. Tymer*, 87 Ind. 529; *Adams v. Slate*, 87 Ind. 573; *Ruff v. Ruff*, 85 Ind. 431; *Reynolds v. Baldwin*, 93 Ind. 57; *Radcliff v. Radford*, 96 Ind. 482; *McLean v. Equitable Life Assurance Society of U. S.*, 100 Ind. 127 (50 Am. R. 779); *Wright v. Julian*, 97 Ind. 109; *Stockwell v. State, ex rel.*, 101 Ind. 1.

Third. In passing upon the evidence demurred to (which, as we have seen, is the evidence of the party adverse to the party demurring), the court will not attempt to reconcile conflicts, and hence will not consider such evidence as is favorable to the demurring party, if there be any opposing evidence upon the same question; and hence, also, will not weigh the evidence to determine whether any particular fact is established, but will take as true every fact of which there is any evidence. *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300; *Indianapolis, etc., R. R. Co. v. McLin*, *supra*; *Ruff v. Ruff*, *supra*, and cases there cited; *Bethell v. Bethell*, 92 Ind. 318; *Wright v. Julian*, *supra*; *McLean v. Equitable Life Assurance Society of U. S.*, *supra*; *Stockwell v. State, ex rel.*, *supra*. In the case of *Willcuts v. Northwestern Mut. Life Ins. Co.*, *supra*, which is a well considered case upon the question of a demurrer to evidence, this court quoted with ap-

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proval from 2 Tidd's Practice, 865, note, the following: "So, if the plaintiff call several witnesses to prove the same transaction, some of whom testify unfavorably to him and others in his favor, the defendant, by demurring to the evidence, admits that the latter have told the truth, and so the court must take it, though the jury would have believed the former."

Fourth. There is a limitation upon the general rules above stated, which, in some sense, is itself a rule, and that is, that while a demurrer to evidence admits as true all facts of which there is any evidence, and all inferences which a jury might draw from them, or which may be reasonably drawn from them, forced and violent inferences are not admitted. *Willcuts v. Northwestern Mut. Life Ins. Co., supra; Talkington v. Parish*, 89 Ind. 202; 2 Tidd Pr. 865, note.

Appellant's first contention is, that there is no evidence that the trunk was ever delivered to or received by appellant or its agent, and that, hence, its demurrer to the evidence should have been sustained. We think that under the above rules and decisions the court below correctly held that the evidence tended to show a delivery of the trunk by appellee and an acceptance of it by appellant. Appellee testified that she sent her trunk in the evening, between 9 and 10 o'clock, with a view of taking the 4:25 morning train, known as No. 5, and that she had so sent her trunk in advance of the train on a former occasion.

Her witness, Quimby, who acted as her agent in the delivery of the trunk, testified that after the trunk arrived and had been placed upon the platform near the baggage-room door, and "under the eaves, in the dry," and as he was about to open the door of the baggage-room, Mr. Wilcox, the baggageman, came out, when he, Quimby, said: "Here is a trunk for No. 5; put it in the baggage-room." The baggageman answered: "No, leave it out there, it will be all right."

This evidence, we think, tends to prove that the baggageman accepted and received the trunk as baggage, and that the owner, by her agent, surrendered the possession, care and

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control of it to him. If the case had gone to the jury upon the above evidence alone, and they had found that the trunk was delivered as baggage, clearly this court, upon appeal, could not reverse the judgment for want of evidence.

From the above evidence, in connection with the balance of appellee's testimony, it is plain that the trunk was sent to the baggage-house as baggage, and not as freight or merchandise of any kind. Appellee intended to take the morning train; she had thus sent her trunk in advance of the train upon a former occasion, and it seems to have been received. She doubtless thought that it would be so received upon this occasion. The reasonable inference is that Quimby, her agent, when he asked the baggageman to put the trunk into the baggage-room, thought that the agent would accept it, and take care of it in advance of the train upon which it was to be transported. And when the baggageman told him to "leave it out there, it will be all right," he might well infer that the agent intended to, and would, look after it as in his possession. The simple "no," to the request to put it in the room, in connection with what followed, would not lead Quimby to understand that the agent declined to receive the trunk. Quimby's action in going off and leaving the trunk indicates that he understood from the agent's answer that he would receive and take care of the trunk until the arrival of the morning train. Quimby doubtless intended to surrender the possession and care of the trunk to the agent. Had the agent told him that he could not receive the trunk on account of the rules and regulations of the company, or for any other cause, it is not probable that he would have left it upon the platform, with no one to look after it. The agent, doubtless, regarded the trunk as a traveller's baggage to go on "No. 5," and expected that upon the arrival of the train the traveller would be on hand to go upon the same train. And from what he said to Quimby it is but a reasonable inference that he intended to receive and care for the trunk, either upon the

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platform where it then was, or by subsequently putting it into the baggage-house.

We do not think that it makes any difference that Quimby did not inform the agent of the fact that the trunk belonged to appellee. Ticket agents and baggagemen know the names of but very few out of the many thousands who buy tickets and deliver baggage. Nor do we think that it makes any difference that the agent did not know to what place the baggage was to be sent. He received it to be forwarded to whatever place the owner might direct upon her arrival to take the train. It is true that the agent was called by appellee as a witness, and in his testimony in chief, and upon cross-examination, negatived the testimony of Quimby.

This evidence, although from appellee's witness, was evidence in favor of appellant. It was in conflict with the testimony of Quimby. Under the well settled rule, therefore, it was withdrawn from the consideration of the court by the filing of the demurrer to the evidence.

In passing upon a demurrer to evidence, the court is called upon to rule upon a question of law, and hence there must be no conflict as to the evidence. If a party seeks to make available a conflict in the evidence as to any fact, he must go to the jury or to the court sitting as a trier of the facts. If he resorts to a demurrer to the evidence, he thereby withdraws all evidence in conflict with the evidence which tends to establish a fact in favor of the other party. As we proceed, we shall find that the authorities support our conclusion that there was evidence tending to prove, and from which it might reasonably be inferred, that the trunk was delivered by appellee and accepted by appellant as baggage.

There is no reason why railway companies may not receive baggage in advance of the train upon which it is to be transported, and in advance of the purchase of a ticket or the payment of fare by the owner, and thus become liable for its loss. They undoubtedly have the right to make reasonable rules and regulations, and a rule that a person intending to

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become a passenger shall purchase a ticket or pay fare before the company receives and becomes responsible for his baggage, is, undoubtedly, a reasonable regulation, as such a regulation secures good faith and fair dealing. But if the company adopts no such a rule, or if, having adopted, it adopts a practice and custom to the contrary, or if, notwithstanding such a rule, it receives a person's trunk as baggage, trusting to his honesty to purchase a ticket or passage upon the train upon which the trunk is to go, it will be liable for its loss, whether that loss occurs before or after the arrival and departure of the train, or before or after the purchase of a ticket or payment of fare.

In the case of *Green v. Milwaukee, etc., R. R. Co.*, 41 Iowa, 410, the facts were these: The plaintiff, for two and one-half years, had been teaching school in Decorah, Iowa. She spent her summers at Boscobel, Wisconsin, whither she was in the habit of going three times a year. On the afternoon of August 30th, 1870, she talked with the company's agent at Boscobel about going back to Decorah, and informed him that her trunk would be sent to the depot that afternoon to take the early morning train west. In the evening of the same day plaintiff sent her trunk to defendant's depot, labelled with her name printed on a card, and Decorah, Iowa, written below it, as she had been in the habit of doing three times a year during the previous two and one-half years. The agent was not present when the trunk was left at the depot, but the trunk was afterwards locked up in defendant's baggage-room. Passengers frequently thus sent their trunks thus marked. The agent at Boscobel had always refused to sell plaintiff a ticket, or to check her trunk to Decorah, and she had been in the habit of paying her fare and getting her check upon the train. On the night the trunk was thus put in the baggage-room the depot was burned, and plaintiff's trunk was not afterwards seen. The next morning she went to the depot for the purpose of taking passage to Decorah, but abandoned the intention because of the loss of her trunk.

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The railroad company requested the trial court to instruct, that it is not enough to make the company liable, that the baggage was received by the company, but that it must be received under a contract to carry both the passenger and his baggage, and that this contract, to be binding, must be mutual and bind both parties; that if the plaintiff placed herself under no obligation to become a passenger, but only expressed an intention to become a passenger at a future time, and if, under the intention of the parties, the plaintiff could rightfully withdraw her trunk at any time without taking passage, then defendant's possession of the trunk during the night was not that of a common carrier, and the plaintiff could not recover. A further instruction was asked, that the obligation to carry the baggage can not be separated from the obligation to carry the person; that if the plaintiff left the trunk in question with the agent the night before the morning on which she intended to take the train, and paid no fare, but simply expressed an intention to take the train the next morning, she did not, by so doing, become a passenger, and was under no obligation to become a passenger at all, and the defendant's obligation to take care of a passenger's baggage did not arise unless she afterwards became a passenger. In speaking of these instructions the Supreme Court said: "These instructions, though plausible, are unsound. They both recognize the doctrine that a railroad company assumes no duties as a common carrier respecting the baggage of one, so long as he may withdraw his baggage and conclude not to take passage. A person may be entitled to be protected as a passenger without purchasing a ticket or entering a car. *Allender v. C., R. I. & P. R. R. Co.*, 37 Iowa, 264 (270). Yet it can not be doubted that, before doing these acts, he might abandon his intention of taking actual passage. If a person can demand protection to himself as a passenger, he may also require that his baggage be cared for as the baggage of a passenger. Suppose a party at a railway station places his baggage in possession of the bag-

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gage-master and procures a check, and proceeds to purchase a ticket, but before he makes the purchase his baggage is stolen, in consequence of which he is compelled to forego the journey, and determines not to buy a ticket, may he not recover on account of the loss of his baggage? * * * The true question is not what the party might do, without the incurring of legal liability, but what, in view of all the circumstances disclosed, did he intend to do?" It was held that there was an acceptance of the trunk as baggage, and that the railway company was liable for its loss, although the plaintiff had not purchased a ticket nor paid for her carriage. See same case, *Green v. Milwaukee, etc., R. R. Co.*, 38 Iowa, 100.

In the case of *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281, the facts were these: The plaintiff took his trunk to the station at 11 A. M., and requested that it might be checked for the next train, which started at 3 P. M. for Bridgeport. He was informed that it was not the custom to check baggage until about fifteen minutes before the time when the train should leave, whereupon he left his trunk in the care of the agent of the company in the baggage-room of the station. At the customary time it was checked for him and put on the cars for Bridgeport, and he went on the same train. When he received the trunk again it had been rifled of its contents, but whether before or after it was checked was not known. The company claimed, and asked the court to charge, that if the trunk was rifled after it was left at the station, and before it was checked, there could be no recovery. It was held that the railroad company was to be regarded as receiving the trunk for transportation when first delivered, and not for storage, and that its liability commenced as soon as it was delivered and received by the agent. The court said: "The reasonable convenience of travellers requires that they have an opportunity to deliver baggage at any reasonable time before the departure of the train, and it is therefore the duty

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of a railroad company to keep an agent at all important stations to receive and take charge of baggage. * * * It (the check) is not the contract, but evidence of the ownership, delivery and identity of the baggage. It is the delivery and acceptance, the abandonment of all care of the baggage by the passenger, and the assumption of it by the agents of the carriers, expressly or impliedly for the purpose of transportation, which fix the liability of the latter as such, and that liability begins when the baggage is delivered to the agent of the company for carriage." There is no evidence that the owner of the trunk had a ticket when he left it with the agent.

In the case of *Camden, etc., R. R. Co. v. Belknap*, 21 Wend. 354, the facts sufficiently appear in the opinion, by BRONSON, J. He said: "The facts which remain * * are, that the defendants were common carriers between New York and Philadelphia, and that they carried passengers and their baggage, as well as merchandise. In conducting this business the defendants, either for profit or convenience, or both, kept two offices in the city of New York; in one of which (at No. 12 Washington street) they were in the habit of receiving, and, if requested, locking up the baggage of persons intending to take passage in the next boat that should depart. The plaintiff, intending to proceed on his journey by the next boat, delivered his baggage at this office, where it was received by Bliven, the defendants' servant or agent, with full knowledge of the purpose for which it was delivered. Now, I think it quite clear, upon this statement, that the plaintiff's trunks were in the possession of the defendants *as common carriers*, and that they were answerable, in that character, for the safe keeping of the property." The trunk was lost before the departure of the next boat, and the owner went by another route. He was allowed to recover the value of the trunk and contents. It is not definitely stated, but it is apparent, that he had not purchased a ticket or paid fare.

In the case of *Rogers v. Long Island R. R. Co.*, 1 T. & C.

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(N. Y. Supreme Court R.) 396, the facts were, that the plaintiff sent his trunk to defendant's depot by an expressman. The trunk had a card fastened on it, marked with plaintiff's name and the place of his destination. The expressman placed the trunk by the side of a baggage crate, situated opposite a window in the ticket office, through which it might be seen. He informed the agent of defendant in charge of the depot where the trunk was, and such agent replied, "All right," and told two men, who were in the depot, to take care of it, whereupon the expressman left the depot. The plaintiff arrived later in the day, and purchased a ticket for Riverhead, and, upon applying for a check for his baggage, the trunk could not be found. The circuit judge charged the jury that if they credited the witness who testified to these facts, the defendant became responsible for the safe delivery of the property. The supreme court said: "We think this (charge) was correct. It is not easy to see what further act could be required of the plaintiff in order to make the delivery complete. No further act of his could put the property more fully within defendant's control." This decision was affirmed by the Court of Appeals. *Rogers v. Long Island R. R. Co.*, 56 N. Y. 620. Here, again, it is apparent that the owner of the trunk had not purchased a ticket or paid fare when the trunk was received by the carrier. See, also, *Bankier v. Wilson*, 5 Lower Canada R. 203.

It has been frequently held that under certain circumstances a person may be entitled to the rights and protection of a passenger, although he has not purchased a ticket or paid fare, and although there is no consummated contract of carriage. These cases turn upon the question as to whether or not the person in good faith *intended* to become a passenger. *Thompson Carriers of Passengers*, p. 42; *Allender v. Chicago, etc., R. R. Co.*, 37 Iowa, 264; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Gordon v. Grand Street, etc., R. R. Co.*, 40 Barb. 546; *Brien v. Bennett*, 8 Car. & P. 724. If a person thus *intending* to become a passenger, may

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be entitled to the rights and protection of a passenger as to his person, there is no reason why a person thus *intending* to become a passenger may not hold the carrier for the loss of his baggage.

We can not regard the case of *Ford v. Mitchell*, 21 Ind. 54, cited by appellant's counsel, as controlling here, because in that case the box was not delivered to any one held out as the proper person to receive such freight.

The case of *Grosvenor v. New York Central R. R. Co.*, 39 N. Y. 34, also cited by appellant's counsel, turned upon the proposition, that the property for shipment was not delivered at the proper place, and that the owner carelessly left it in a dangerous position; and, further, that it was not, therefore, delivered to the carrier.

Without extending this opinion to express our approval or disapproval of the reasoning in the case upon the question of delivery, it is sufficient to say that, in the case before us, the trunk was delivered upon the platform, near the door of the baggage-room, which was certainly a proper place to deliver baggage to the baggageman. The case of *Mattison v. New York Central R. R. Co.*, 57 N. Y. 552, cited by appellant's counsel, was decided upon this state of facts: Upon arrival of the passenger and her baggage at the place of destination, she informed the baggage-master at the station that she desired to leave her trunk for a few days, perhaps for two weeks. The baggage-master replied, that he was not allowed to and could not keep the baggage with the check on; that if she gave up the check the baggage would be perfectly safe. This she did, and the trunk was left. About a week after it was thus left, the trunk was delivered to one falsely claiming authority to receive it. It was held (DWIGHT and EARL, C C., dissenting), that the declaration of the agent was, in substance, a notification to the plaintiff that he was without power to continue in force the obligation of the company in respect to the baggage indicated by the check, and the surrender of the check was, in effect, an admission of the performance of

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that obligation, that is, of the safe arrival and the delivery of the baggage. The decision was based upon the proposition that the surrender of the check, under the circumstances, was an admission by the plaintiff not only of the safe arrival, but also of the delivery of the baggage to her, and that she was bound to know that the agent could not make storage contracts after the performance of the contract of carriage. The conclusion was combated in the opinion by the dissenting judges.

It might suffice to say of this case, that the facts are unlike the facts in the case before us. There it was a question of fact as to whether or not the owner had received her trunk from the carrier; here it is a question whether there is evidence which tends to show, or from which it may be reasonably inferred, that the carrier received the baggage from the owner. Here the agent was held out as having general authority to receive the baggage of persons intending to go upon the company's trains; there it can not be said that baggage-masters are held out as having general authority to make contracts of storage, after the completion and performance of the contract of carriage.

We are cited to the case of *Wright v. Caldwell*, 3 Mich. 51. In that case the owner of the trunk placed it upon a steamboat, but he did not deliver it to any one, nor call the attention of any one connected with the boat to the fact that he had placed the trunk upon the boat for carriage, or for any other purpose. That case is different in many features from the case in hearing.

Steamboats carry both freight and passengers. When a trunk, therefore, is placed upon a steamboat by the owner, it may be as freight or as baggage, according to circumstances. If not delivered and accepted as baggage, and the owner should allow the boat to depart without becoming a passenger, it is clear that he could not recover, as for lost baggage. But if a person delivers a trunk to a baggageman of a railway company, and it is received, it is difficult to see how it could rea-

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sonably be said that it is received as freight. The baggage-man is held out as having authority to receive baggage, but he is not held out as having authority to receive freight. The public know that he has authority to receive baggage, and they are bound to know that he has not authority to receive freight, unless, indeed, he acts as both baggageman and freight agent. When, therefore, a trunk is delivered to an agent of a railway company who is a baggageman only, and he receives it, the presumption is that it is delivered and received as baggage.

The cases already cited by us show that a railway company may receive a trunk as baggage, and become liable for its loss as such before transit, upon the express or implied understanding that the owner is to become a passenger, although he has neither purchased a ticket nor paid fare. In such a case the express or implied agreement to become a passenger makes the owner in such sense a passenger, as to make the railway company liable for the loss of his baggage up to the time when the train leaves, and it is ascertained that the owner has not kept his agreement by becoming a passenger. If the railway company is willing to receive a trunk as baggage, and assume the responsibility of holding it as such upon the express or implied agreement of the owner to become a passenger, there is nothing to prevent it so doing.

In the case before us, the evidence tends to show that the trunk was so received; and the evidence is clear that appellee kept her agreement by purchasing a ticket for passage upon the train upon which she informed appellant the trunk was to go.

We have thus spoken of what the *company* may do. In the case before us, whatever was done in behalf of the company was by a subordinate agent, and the further contention of appellant is, that appellee's evidence shows that the agent had no authority to accept or receive baggage in advance of the train upon which it was to go, and in advance of the purchase of a ticket or the payment of fare by the

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owner. In other words, that the agent had no authority to receive the trunk until after a consummated contract of carriage by the payment of fare had been entered into between the owner of the trunk and the railway company. Appellee's evidence does show that the authority of the baggage-man was thus limited by the rules and regulations of the company. Whether or not the filing of the demurrer to the evidence withdrew all of this evidence is a question which, for the present, we do not decide, but treat the case as though that evidence were to be considered.

There is no evidence at all showing, or tending to show, that appellee had any knowledge or notice of the rules and regulations limiting the authority of the agent, or fixing the manner or time of receiving baggage by him. Her baggage having been received upon a former occasion, under like circumstances, might well have led her to believe that the company thus received baggage in advance of the train, and in advance of the purchase of a ticket or the payment of fare. And she might well have been confirmed in this belief by the fact that upon this occasion the agent received the baggage without in any way giving notice or intimating that his authority was limited, as now contended. The course of the agent upon this occasion, as well as upon the former, was well calculated to prevent any inquiry by appellee as to any rules or regulations.

Nor is there any evidence that the public generally had any notice of the rules and regulations so limiting the authority of the agent. Appellee, we must presume, acted in good faith, with no notice of such rules and regulations. Having found this, and that her trunk was delivered to, and received by, the agent as baggage, the question is, must appellee, who is without wrong, lose the value of her trunk and its contents because the railway company had placed a limit upon the authority of its agent? That she must thus lose, we think, is a proposition not supported either by reason or authority.

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A The baggageman was the agent of appellant, with general authority to receive the baggage of persons intending to go upon the company's trains. He was so held out to the public. That was the general scope of his business, authority and agency. Whatever he did within the general scope of this agency was binding upon the company, unless the owner of the baggage, in some way, had notice of a limitation imposed upon his general authority.

Mr. Wood, in his work on *Railway Law*, vol. 1, p. 447, citing authorities in support of this text, says: "Strangers dealing with the agent of a corporation are not bound to inquire what the corporation has in fact authorized him to do, but may deal with him in reference to those powers which it has held him out to the world as being possessed of,—in other words, in reference to his apparent authority. * * * The maxim *qui facit per alium, facit per se* applies with full force to corporations; and the rule is not a doubtful one, either in policy or principle, that in transactions where one of two persons must sustain a loss, the loss must fall upon him who has made it possible for the other, innocently, to be placed in a position where loss might result to him except for the application of this rule. It would be disastrous to commercial, as well as other interests, if a person, by acting through the agency of another, could shield himself from liability for such person's acts *ad libitum*. Fortunately, no such rule exists, and he who intrusts authority to another, in whatever department of business, is bound by all that is done by his agent *within the scope of his apparent power*, and can not screen himself from the consequences thereof upon the ground that no authority in fact was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as to put the person dealing with him upon inquiry as to his real authority. * * The rule may be said to be, that restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them upon inquiry as to the extent of

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his actual authority. The question is not what the powers of the agent in fact were, but what power did the company hold him out as possessing? From the business with which the agent was intrusted, had the person dealing with him a right to understand that he had authority to do the particular act, in reference to which the principal denies his authority?" And again, at page 425, of the same volume, the author says: "So station agents are presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers the public can not take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them."

These are familiar principles, and supported by authority everywhere. *Evansville, etc., R. R. Co. v. McKee*, 99 Ind. 519 (50 Am. R. 102); *Louisville, etc., R. W. Co. v. McVay*, 98 Ind. 391 (49 Am. R. 770); *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Pruitt v. Hannibal, etc., R. R. Co.*, 62 Mo. 527; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117 (10 Am. R. 566); *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Eclectic Life Ins. Co. v. Fahrrenkrug*, 68 Ill. 463; *Farmers, etc., Ins. Co. v. Chestnut*, 50 Ill. 111; *Hutchinson Carriers*, sections 267-8-9; *Heenrich v. Pullman, etc., Co.*, 18 C. L. J. 293.

The facts in the case of *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111 (22 Am. R. 603), are these: M. got from the company's agent two bills of lading for a quantity of lard, consigned to the plaintiffs at New York. These bills recited the receipt of the lard by the company. M. made drafts upon the plaintiffs for \$7,200, and attached thereto the bills of lading. Upon the faith of these bills, plaintiffs paid the drafts. The fact was that the railway company's agent issued these bills before the receipt of the lard, and it never was received by the company. The company defended on the ground that the authority of Street, its agent, was confined to bills of goods actually within its control, and that as the lard had not been delivered when the bills of lading were issued by

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him, he exceeded his authority and the company was not liable to the plaintiffs who had paid the drafts upon the faith of the bills.

In answer to this argument the court, amongst other things, said: "Street, having power to issue bills direct to consignees for goods actually in the possession of the defendant, and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith."

A case, involving a state of facts almost identically the same as involved in the case last above, has recently been decided by the Supreme Court of Pennsylvania. *Brooke, v. New York, etc., R. R. Co.*, 1 Cent. Rep. 123, citing and approving *Armour v. Michigan Central R. R. Co.*, *supra*. The court said: "It is contended that, inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein, has actually been given by the railroad company to Weiss (agent), it was not in any manner responsible for his unauthorized act, even as to innocent third parties who were misled and injured thereby. We can not assent to this proposition. As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested, but, as between the principal and the agent, the true limit is the express authority or instruction given to the agent. Evans Agency, 594, 606; *Adams Ex. Co. v. Schlesinger*, 75 Pa. St. 246. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions, and this is especially the case with officers and agents of corporations. Since a corporation acts only through agents it is bound by its agents' contracts when made ostensibly within the range of their office."

The decisions in the two cases last above were made to turn to some extent upon the doctrine of estoppel; that where one

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of two persons must suffer by the wrong of a third, he shall lose who puts the third person in a position to commit the wrong. That doctrine may well be applied to the case before us. Appellant's agent had general authority to receive the baggage of persons intending to go upon its trains. It is claimed that the company had put a limit upon his authority, as to the time and manner of receiving such baggage. This limitation was not known to appellee, nor was there anything to put her upon inquiry; on the contrary, the course of the agent was such as to prevent inquiry.

Acting within the general scope of his employment, the agent received the trunk as baggage, and then abandoned all care of it, and left it upon the platform. If he had declined to receive the trunk, it would not have been lost. By his wrong it was lost. Appellant placed him in a position, and clothed with apparent authority, to receive the trunk as he did. Appellee having relied upon his apparent authority, and having upon this reliance placed her trunk in his possession, the railway company can not now, to escape liability, be heard to say that in receiving the trunk the agent exceeded his real authority.

Of course, railroad companies do not give out that their baggage-rooms are store-houses, and hence the public have no right to assume that they are such. Persons would have no right to send their baggage to such baggage-rooms to be kept in store, or to be kept for an unreasonable time as baggage awaiting trains. The time prior to a train, therefore, must be a reasonable time. If the time should be unreasonable, that of itself might be sufficient to put persons upon inquiry even though the baggage should be received by the agent. The time in this case, from 9:30 at night until the 4:25 morning train, was not unreasonable, nor of itself sufficient to put appellee upon inquiry as to the authority of the agent to receive the baggage.

In support of the contention that appellee was bound to know of the rules and regulations limiting the manner and

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time of the receipt of baggage by the agent, appellant's counsel cite the cases of *Eaton v. Delaware, etc., R. R. Co.*, 57 N. Y. 382 (15 Am. R. 513), *Cleveland, etc., R. W. Co. v. Bartram*, 11 Ohio St. 457, and *Elkins v. Boston, etc., R. R. Co.*, 23 N. H. 275. These cases assert the familiar doctrine that all persons are bound to know that freight trains are for the carrying of freight, and passenger trains for the carrying of passengers, and hence must also take notice of the rules and regulations of railway companies, by and under which freight may be sent upon passenger trains, or passengers may go upon freight trains. The fact that there are freight and passenger trains is notice to the public that the carrier has made a division of its business. Persons are, therefore, bound to know that they can not, as a matter of right, travel upon freight trains; that if allowed upon them at all, it must be by special leave and as a special favor, or under such rules and regulations as the railway companies may have adopted. They are bound to know these things, because the division of the carrier's business puts them upon inquiry.

In the case of *Ohio, etc., R. W. Co. v. Hatton*, 60 Ind. 12, cited by appellant's counsel, it was held that it is the duty of persons, before taking passage upon trains, to ascertain whether or not, under the running regulations of the company, they will stop at the stations to which such persons may wish to go.

It is notorious, that in the rapid transportation of through passengers, all trains do not stop at every station. They are not held out as so stopping. And hence it is, that persons are put upon inquiry, and must ascertain whether or not any particular train stops at their particular station. This is a different case from that of clothing an agent with apparent general authority, and imposing secret limitations with nothing to put persons upon inquiry.

We have extended this opinion somewhat, on account of the importance of the questions involved, and the earnestness and ability with which those questions have been dis-

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cussed by counsel. After this extended and careful examination, we are clear in our opinion that the judgment should be affirmed. It is, therefore, affirmed with costs.

MITCHELL, J., did not participate in the decision of this case.

Filed Dec. 29, 1885.

No. 11,890.

HUSEMAN v. SIMS ET AL.

PLEADING.—Written Instrument.—Exhibit.—Practice.—Under section 362, R. S. 1881, it is only where the complaint is founded on a written instrument that the filing of a copy as an exhibit makes it a part of the record. **SAME.—Improper Exhibit will not Aid Complaint.**—Where a writing which is not the foundation of the action is filed with the complaint as an exhibit, it can not be looked to to supply an omitted averment, or to otherwise aid the complaint.

EXEMPTION FROM EXECUTION.—Refusal to Allow.—Complaint for Damages.—Pleading.—A complaint to recover damages for the alleged unlawful seizure and sale on execution of property claimed as exempt must state all the facts necessary to show that the plaintiff had complied with the requirements of section 714, R. S. 1881, providing for inventory and affidavit.

From the Dearborn Circuit Court.

H. D. McMullen, for appellant.

J. K. Thompson, for appellees.

Howk, J.—The sustaining of appellees' demurrer to his complaint, for the alleged want of sufficient facts therein to constitute a cause of action, is the only error of which the appellant complains in this court.

In his complaint the appellant Huseman alleged that the appellee Sims was the sheriff of Dearborn county and had been such for two years prior to October 1st, 1883; that, on the 5th day of October, 1882, the appellees Placke and

104	317
125	436
104	317
130	509
104	317
128	463
104	317
124	528
126	126
104	317
146	597

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Schulze obtained a judgment in the Dearborn Circuit Court for the sum of \$1,059.25; that, of the money so recovered in such judgment, the sum of \$750 was due as rent on a written lease for certain real estate, theretofore leased to appellant by the appellees Placke and Schulze, and the sum of \$250 of such judgment, including costs, was for damages assessed against appellant for the unlawful detention of such real estate after the expiration of such lease; that the appellees levied upon and sold, of appellant's property, more than three hundred dollars' worth, over and above the property herein claimed as exempt; that, on the 6th day of October, 1882, the appellees Placke and Schulze caused to be issued out of the clerk's office of such court an execution for the collection of such judgment; that such execution was delivered to sheriff Sims, on the 6th day of October, 1882, and, by virtue of such execution, sheriff Sims levied on all of appellant's property; that the appellant filed his schedule and demanded that the property specified therein, after deducting the said sum of \$250 for damages for unlawful detention, be set off to him as exempt from levy and sale under such execution, which the appellees refused to do, but proceeded to advertise such property and sold the same; that the appellant was, at the time of such levy and sale, and had been since, a resident householder and citizen of the county of Dearborn, in the State of Indiana, and was and had been entitled to exemption. A copy of the appellant's schedule and appraisal was filed with and made part of the complaint. And the appellant said, that, by means of the premises, he was damaged in the sum of \$600, for which and for all proper relief he demanded judgment.

The joint demurrer of all the appellees to appellant's complaint was sustained by the court. The only question we are required to consider and decide may be thus stated: Does the appellant's complaint, the substance of which we have given almost in his own language, state facts sufficient to con-

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stitute a cause of action in his favor and against the appellees or either of them?

In discussing the sufficiency of appellant's complaint appellees' learned counsel says: "The complaint, we submit, is manifestly bad for two reasons, namely:

"1st. The execution was issued on a judgment, not founded on contract, but on tort, and no exemption is allowed; and,

"2d. The complaint does not show that the appellant entitled himself to claim an exemption.

"Considering these objections to the complaint in the inverse order of their statement, the so-called exhibit filed with the complaint, to wit, the copy of appellant's schedule and appraisal, is not a proper exhibit, and hence is no part of the complaint, and can not be looked to in determining the question of its sufficiency. *State, ex rel., v. Read*, 94 Ind. 103; *Conwell v. Conwell*, 100 Ind. 437."

We are of opinion that the second objection urged by appellees' counsel in argument to the sufficiency of appellant's complaint is well taken, and must be sustained. Appellant has sued in this action to recover damages for the alleged unlawful seizure and sale upon execution of his property, which he had the right to claim, and had in fact claimed, as he averred, as exempt from such seizure and sale. It can not be said with any degree of accuracy, that the schedule and appraisal of appellant's property were, in any proper sense, the foundation of his alleged cause of action which he attempted to state in his complaint. Under section 362, R. S. 1881, it is only where the complaint is founded upon a written instrument that the filing of a copy thereof with the complaint makes such copy a part of the record; indeed, it may well be doubted, we think, whether the appellant's schedule and appraisal were a "written instrument," within the meaning of that expression as used in the statute. *Jones v. Levi*, 72 Ind. 586; *Hopper v. Lucas*, 86 Ind. 43; *Conwell v. Conwell*, *supra*.

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The copy of appellant's schedule and appraisement is no part of his complaint, and, therefore, we can not look to such copy in aid of the averments of the complaint or to supply an omitted averment. It is certain the complaint fails to show that the appellant, in claiming his exemption, had substantially complied with the requirements of section 714, R. S. 1881, in this, that he had made and subscribed the affidavit, of and concerning his property, which the statute imperatively required of him, before he could be entitled to claim the benefit of any of the provisions of our exemption laws. In *State, ex rel., v. Read, supra*, the court said: "It is not necessary to set forth the schedule in an answer, as it is not the foundation of the defence. *Hall v. Hough*, 24 Ind. 273. The defence consists of the right to the exemption and a compliance with the statutory requirements as to making, verifying and filing the schedule. An answer, which shows the person to be entitled to the exemption and to have filed such a schedule as the law requires with the proper officer, is good. This is done in the present instance by fully stating all the material facts, and this is the proper method."

In the case in hand, the appellant did not fully state in his complaint all the material facts necessary to show his substantial compliance with the requirements of section 714, *supra*. Therefore his complaint was bad for the second reason assigned as above by appellees' counsel; and this conclusion renders it unnecessary for us to consider the first reason assigned as above by such counsel.

The demurrer to the complaint was correctly sustained.

The judgment is affirmed, with costs.

Filed Dec. 30, 1885.

Washburn v. The Board of Commissioners of Shelby County.

No. 11,776.

WASHBURN v. THE BOARD OF COMMISSIONERS OF SHELBY COUNTY.

DEMURRER TO EVIDENCE.—*Exclusion of Competent Evidence.*—*Practice.*—By demurring to evidence the defendant does not deprive the plaintiff of the right to make available questions upon rulings excluding evidence.

TOWNSHIP TRUSTEE.—*Power to Employ Physician for Poor.*—Where the physician employed by the county refuses to treat a poor person who is in urgent need of medical attention, the township trustee has authority to employ another physician.

SAME.—*Evidence.*—*Declarations of Trustee as to Payment.*—In an action against the county by a physician employed by a township trustee to treat one in need of immediate attention, the declarations of the trustee concerning payment for services so rendered are admissible in evidence.

From the Shelby Circuit Court.

T. B. Adams and L. T. Michener, for appellant.

E. K. Adams and L. J. Hackney, for appellee.

ELLIOTT, J.—In the fall of 1882, Benjamin C. Allen, a poor person, had his hand so seriously injured in a saw-mill as to make it necessary to amputate it. The appellant was a physician, living at Waldron, Liberty township, Shelby county, and while at supper he was called to attend to Allen, whom he found sitting on the step of his office waiting for him. The messenger who had called the appellant asked the latter if he did not need assistance, and receiving an affirmative answer, he summoned Dr. McCain the physician employed by the county to attend the poor. Dr. McCain was asked to attend to the patient, but peremptorily refused for the reason that Dr. Washburn had been first called to the case. The township trustee was informed by Dr. Washburn that he had amputated Allen's hand, and the trustee said to him, that he had commenced the case and "must go ahead with it."

The appellant offered to prove what was said by the trustee concerning paying for the services rendered Allen, but the court excluded the evidence.

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We do not think that the fact that the appellee demurred to the appellant's evidence precludes him from availing himself of a ruling excluding competent evidence. To hold that a party by demurring to evidence may render unavailing a ruling, made against his adversary, excluding competent testimony, would work great injustice, for, by so holding we should lay down a rule that would enable a defendant to secure erroneous rulings on the admission of evidence, and then, by demurring to the evidence admitted, deprive the plaintiff of the benefit of the rulings excluding evidence, however erroneous they might be, and however great the injury done to him by such rulings. The case is not at all like that of the demurring party asking a review of rulings upon the admission and exclusion of evidence, for he, by his own act, submits the cause for decision upon the evidence received by the court, and thus impliedly waives all questions upon rulings made in the course of the trial, but his adversary does no affirmative act waiving rulings to which he has reserved proper and timely exceptions. If the rule were that the party compelled to join in the demurrer to the evidence waived all questions reserved upon rulings made in the course of the trial, then he would be completely at the mercy of his adversary and might be deprived, without any fault on his part, of the evidence upon which his case depended. We hold that a defendant who demurs to the evidence can not deprive the plaintiff of the right to make available questions upon rulings excluding evidence.

We think that the declarations of the township trustee ought to have been admitted. There was testimony tending to prove that the case was one of emergency, that the physician employed by the county had refused to treat the injured man; and in such a case the township trustee, who is by virtue of his office overseer of the poor, had authority to sanction the employment of another physician. We do not hold that in ordinary cases the township trustee has authority to call in any other physician than the one employed by the

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county. On the contrary, our opinion is that in ordinary cases he has no authority to call any other than the physician engaged by the board of commissioners. Where, however, that physician refuses to act, and there is a case requiring immediate treatment, the township trustee may call another physician. We can not believe that the law intended that a poor man or woman urgently in need of medical or surgical attention should be left to suffer in cases where the county physician refuses to render professional services. The authority to take measures to prevent, if possible, suffering and death, must be lodged in some local officer, for it certainly was never intended that the sufferer should wait until the board of commissioners could be called together and an order obtained authorizing the employment of a physician.

The decided cases support the views we have expressed. Thus, in *Board, etc., v. Seaton*, 90 Ind. 158, it was held that the trustee might employ a physician in a case where the county physician lived so far distant from the sick person as to be unable to give the sick person the attention he required. It was held in *Conner v. Board, etc.*, 57 Ind. 15, that where the county physician abandoned his contract, the trustee might employ another physician. The decision in *Board, etc., v. Ritter*, 90 Ind. 362, affirms that there are cases in which the township trustee, as overseer of the poor, has authority to employ a physician although one had been previously employed by the county. The decision in *Board, etc., v. Boynton*, 30 Ind. 359, correctly states the general rule, that where a county physician has been employed, the township trustee can not employ another, but that decision does not apply to a case where the county physician refuses to render service to a poor person needing immediate attention.

The trial court erred in not admitting in evidence the declarations of the township trustee, and the judgment is reversed, with instructions to grant the appellant a new trial.

Filed Dec. 8, 1885; motion to modify judgment overruled Dec. 29, 1885.

Day v. Henry.

104 824
150 20

No. 11,548.

DAY v. HENRY.

JURISDICTION.—*Plea.*—Where the want of jurisdiction is not apparent, the question must be presented by plea.

SAME.—*Appearance.*—*Waiver.*—*Justice of the Peace.*—By appearing to an action before a justice of the peace, and going to trial without pleading to the jurisdiction of the court, a party waives all questions relating to the service of process or jurisdiction of the justice.

EVIDENCE.—*Agency.*—*Pleading.*—In an action to recover for work and labor performed for the defendant, evidence that the person who employed the plaintiff was the agent of the defendant, is admissible without averring the agency in the complaint.

PRACTICE.—*Judgment non Obstante Verdicto.*—Judgment can not be rendered *non obstante* on answers to interrogatories returned by the jury with their general verdict, unless the former are inconsistent with the verdict.

From the Crawford Circuit Court.

T. J. Jackson and J. L. Suddarth, for appellant.

N. R. Peckinpugh and W. T. Zenor, for appellee.

MITCHELL, J.—This suit was commenced before a justice of the peace. The complaint charged that the defendant was indebted to the plaintiff in the sum of one hundred and twelve dollars, for work and labor performed by the plaintiff for the defendant in his mill, from July, 1882, to May 12th, 1883, at the special request of the defendant. With the complaint there was filed a sufficient bill of particulars, which was referred to therein.

On the day set for trial, the record recites that the parties appeared, and the defendant moved to dismiss the action, for the reason that the court had no jurisdiction, and because there was no legal service of summons. This motion was overruled, and the defendant thereupon moved to dismiss because the complaint did not state a cause of action. After this last motion was overruled, a trial was had resulting in a judgment for the plaintiff.

The case was removed by appeal to the Crawford Circuit Court, where the several motions made before the justice were

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renewed, and again overruled. A trial by jury resulting adversely to the appellant, the record is brought here on appeal for review.

It is contended, first, that the court erred in overruling the motion to dismiss for want of jurisdiction of the justice, and because the defendant was not legally served with summons.

The complaint filed with the justice exhibited a cause of action within the jurisdiction of the court, and as the record shows that the defendant appeared, the justice had jurisdiction both of the subject-matter of the action and of the person of the defendant. The argument here is that the appellant was sued out of the township in which he resided, and for that reason the justice had no jurisdiction over his person and the constable had no legal right to serve him with process. Where the defendant resided did not appear on the face of the papers, and since no objection to the jurisdiction of the court was disclosed by the record, that question could only have been presented by a proper plea. Appearing to the action and going to trial before the justice without pleading to the jurisdiction of the court was an effectual waiver of all questions relating to the service of the summons or jurisdiction of the justice. *Ludwick v. Beckamire*, 15 Ind. 198; *Storm v. Worland*, 19 Ind. 203; *Grass v. Hess*, 37 Ind. 193; *Nesbit v. Long*, 37 Ind. 300. Whether the court had jurisdiction of the defendant or not, could not be raised by a motion to dismiss.

The complaint was amply sufficient, and there was no error in overruling the motion to dismiss the action for want of a statement of a cause of action.

The plaintiff testified that he was employed by one Wilson, and that the work and labor sued for was performed under such employment. An attempt is made to present a question upon the ruling of the court in admitting evidence to prove that Wilson was the defendant's agent. The bill of exceptions, admitting it to be properly in the record, presents no question for decision. All that is said in the bill is,

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that the "Defendant objected to plaintiff attempting to prove the agency of said George W. Wilson, for the reason there was no such allegation in the complaint," etc. How or by whom the plaintiff attempted to prove the agency is not disclosed, nor is there any specific evidence objected to so far as appears. Of course, it was proper to prove, if it was the fact, that Wilson was the defendant's agent and employed the plaintiff on the defendant's account. It was not necessary that the agency should have been averred in the complaint in order to admit such proof.

With their general verdict the jury returned answers to special interrogatories propounded by the respective parties. It is insisted that the court erred in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict.

The contested point in the case was, whether one George W. Wilson, who employed the plaintiff to work in the defendant's saw-mill, was at the time of such employment the agent of the defendant, and employed plaintiff on defendant's behalf, or whether he employed him on his own account.

Without prolonging the opinion by setting out the interrogatories and the answers thereto, it is sufficient to say it is plainly apparent that they are not inconsistent with the general verdict. In answer to the fourth interrogatory propounded by plaintiff, and the second by the defendant, the jury return explicitly that the evidence shows that Wilson was the authorized agent of the defendant. The appellant's motion for judgment in his favor was properly overruled.

The only remaining question discussed is, that the court erred in overruling the appellant's motion for a new trial, on the ground that the verdict was not sustained by the evidence. It may be conceded that the evidence strongly preponderates in favor of the defendant below. If it was permitted this court, as it was the duty of the trial court on the motion for a new trial, to weigh the testimony and determine whether or not there was sufficient evidence to support the general

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verdict and special findings, we would unhesitatingly say, as the evidence appears in the record, that the verdict is manifestly against the weight of the evidence.

Under well settled rules we are, however, only permitted to ascertain whether there was evidence fairly tending to sustain the verdict, and as there is some evidence which, if believed, tends to support the conclusions reached by the jury, we can not under the rule disturb their finding.

The judgment is accordingly affirmed, with costs.

Filed Dec. 31, 1885.

No. 11,174.

WALKER, ADMINISTRATRIX, v. HELLER ET AL.

DECEDENTS' ESTATES.—Appeal.—Law of Case.—Practice.—Where an appeal is perfected by an administrator under the law as previously declared by the Supreme Court, and under that law a motion to dismiss the appeal is overruled, that ruling, whether erroneous or not, is the law of the case, and a subsequent motion to dismiss, founded upon a different declaration of the law in another case, will be overruled.

SAME.—Statement of Claim.—Although the statute (section 2310, R. S. 1881) requires only "a succinct and definite statement" of the claim against a decedent's estate, such statement must contain sufficient facts to show *prima facie* that the estate is indebted to the claimant, or it is bad on demurrer.

SAME.—Claim Showing Cause of Action in Third Person.—Where the statement shows a cause of action in favor of some person other than the claimant, it is bad on demurrer for want of facts.

SAME.—Trust.—Pleading.—An allegation in a complaint against a decedent's estate, that the decedent died without having paid to the plaintiff certain money placed in his hands by a third person for the benefit of the plaintiff, and that it is due and unpaid, is sufficient after verdict to show that the decedent at his death, and his administrator upon the filing of the claim, still retained such money.

SAME.—Demand.—The filing of a claim against a decedent's estate constitutes a sufficient demand against the administrator. It is not necessary to aver a previous demand.

104	327
146	291
146	313
104	327
158	92

104	327
171	316

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PRACTICE.—*Judgment on Bad Pleading.*—Where the record affirmatively shows that the judgment rests upon two pleadings, one of which is bad, it will be reversed for a new trial.

From the Hancock Circuit Court.

J. A. New and *J. W. Jones*, for appellant.

A. L. Ogg, for appellees.

Howk, J.—On the 12th day of December, 1882, the appellee Thomas L. Marsh filed his verified claim against the estate of Meredith Walker, deceased, of which estate the appellant was then and since administratrix, in the clerk's office of the court below. Afterwards, such claim having been disallowed by appellant and transferred to the issue-docket for trial, on the application of the appellee Moses Heller, he was made a defendant herein, and thereupon he filed his cross complaint against his co-appellee Marsh and the appellant. The cause was then put at issue and tried by the court, and a finding was made in favor of Marsh and Heller, and against the appellant administratrix aforesaid, in the sum of \$1,085.84. Over appellant's motion for a new trial, the court made an allowance against her decedent's estate, on its finding, in favor of appellee Heller, on the 10th day of April, 1883, and from the judgment below this appeal was taken by filing a transcript of the record in the clerk's office of this court, on the 12th day of September, 1883.

In this court, the appellant has assigned errors, calling in question several of the rulings or decisions of the trial court.

The appellees have filed in this cause several motions, which first demand our attention, and must first be considered and decided.

The records of this court show that, on the 27th day of November, 1883, which was the call-day of the November term, 1883, of the court, the appellees filed a motion to strike this cause from the docket. Under the uniform practice of the court, this motion ought to have been presented and passed upon at the first sitting of the court after call-day and

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not later than the 12th day of December, 1883. But the record and motion appear to have been at once withdrawn, and afterwards withheld from the clerk's office of this court, by counsel engaged in the cause, for nearly six months after the motion was filed, or until on or about the 14th day of May, 1884. On the day last named, the entry of the clerk upon the record shows that the appellees' motion to strike the cause from the docket was overruled by the court. On the call-day of the May term, 1884, of this court, to wit, on May 27th, 1884, the appellees as well as the appellant appeared, by their respective attorneys of record, and, in open court, agreed to the submission of the cause to the court for decision. Thereafter, on the 12th day of July, 1884, the appellees filed another motion to dismiss the appeal herein, and, on the 26th day of May, 1885, a further motion to correct the records of this court in relation to this appeal, and, on the 8th day of June, 1885, a motion for leave to substitute a copy for the original motion to strike this cause from the docket of this court, which original motion as alleged had been lost from the files and could not be found.

Briefs have been filed and oral arguments made by the counsel on both sides for and against the appellees' motions. Upon careful consideration of the facts above recited, and of the decisions of this court prior to the taking of this appeal, and, indeed, until June 26th, 1884, in relation to appeals by executors or administrators under the provisions of the statute regulating the settlement of decedents' estates, we are of opinion that common fairness and justice to the appellant require that the appellees' pending motions should be overruled, and that we should consider and decide such questions in the case as are fairly presented by her assignment of errors. In *Bender v. Wampler*, 84 Ind. 172, the appeal was by an executor from an allowance against his decedent's estate, on the 6th day of February, 1880. The appeal was taken by filing a certified transcript of the record of the cause in the office of the clerk of this court, on the 20th day of January,

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1881, seventeen days before the expiration of one year from the rendition of the judgment appealed from. On the 18th day of July, 1881, the appeal was submitted by the agreement of the parties, for the decision of this court. Before such submission, to wit, on the 25th day of May, 1881, the appellee filed a written motion to dismiss the appeal, "for the reasons that appellant had filed no appeal bond, and the appeal had not been perfected within thirty days after the decision." The appellant was not notified of this motion, apparently, until in January, 1882, and the motion was neither considered nor decided until the final decision of the cause on its merits, on the 23d day of November, 1882. It was there held by the court, (1) that an executor or administrator had a right to appeal to this court, without filing an appeal bond, "at any time within one year after the decision," and (2) that "submission of a cause by agreement waives a motion theretofore made for the dismissal of an appeal for the want of a bond." See, also, the cases of *Bake v. Smiley*, 84 Ind. 212, and *Davis v. Huston*, 84 Ind. 272, in each of which the right of an executor or administrator to appeal, without filing an appeal bond at any time within one year after the decision appealed from, is expressly recognized and upheld.

It is true that, in each of the cases cited, the appeals were governed by the provisions of sections 189, 190 and 193 of the act of June 7th, 1852, providing for the settlement of decedents' estates. But, in *Bender v. Wampler*, *supra*, and *Bake v. Smiley*, *supra*; reference was made to sections 2454, 2455 and 2457, R. S. 1881, in force since September 19th, 1881, as governing appeals thereafter taken from any decision "growing out of any matter connected with a decedent's estate," but without an intimation even that these sections would limit the time within which an executor or administrator must perfect his appeal. Thus stood the law, as declared by this court, at the time the appellant, in accordance therewith, perfected her appeal in the case in hand, and at the time the

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appellees' first motion to strike this cause from the docket was overruled by this court. That ruling of the court, whether erroneous or not, is the law of this case and must stand, and the appellees' subsequent motions, founded upon *Yearley v. Sharp*, 96 Ind. 469, must be and are overruled.

We come now to the consideration of the questions presented by the errors assigned by the appellant upon the record of this cause. The first error complained of in argument by appellant's counsel is the overruling of her demurrer to the claim or complaint of the appellee Thomas L. Marsh.

In his claim or complaint the appellee Marsh alleged that about the beginning of the year 1874 the First National Bank of Knightstown, Indiana, held a certain promissory note for the sum of \$520, executed jointly by himself and one Joseph B. Dunbar, as principals, on which note Meredith Walker, then deceased, was accommodation endorser; that afterwards, in 1874, appellee Marsh, as sole principal, executed another promissory note for \$1,000, bearing ten per cent. interest, also endorsed by Meredith Walker, and negotiated by appellee Marsh to his co-appellee, Moses Heller; that when the \$520 note fell due Meredith Walker, to preserve his own credit, paid it off; that appellee Marsh at that time was engaged in running a saw-mill, and, being in failing circumstances, the said Walker, to secure himself from loss by reason of his payment to the Knightstown bank, and his endorsement on Heller's note, bargained with and engaged the appellee Marsh to furnish him a certain bill of walnut lumber, of the agreed value of \$1,166, which was afterwards, during 1874, on the order of said Walker, delivered by appellee Marsh to one Thomas Frederick; that, in an accounting had between said Walker and Marsh about the beginning of 1875, as an adjustment of the walnut lumber transaction, it was agreed by the parties, Walker and Marsh, that out of the sum due from Walker to Marsh, on account of said walnut lumber, Walker should deduct the moiety of the sum paid by him to the Knightstown bank, with interest, etc., amounting by that time

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to about \$270, relying solely on said Dunbar for the payment of the other half of his said claim, arising out of said bank transaction; and that the residue of the sum due Marsh for said walnut lumber should be applied by said Walker as a partial payment of the \$1,000 Heller note; that afterwards, in 1875, Walker having failed and refused to make any payment thereon, Heller brought suit in the Hancock Circuit Court on said note against both Walker and Marsh; that appellee Marsh had no defence to Heller's suit, and judgment by default was rendered against him therein for the face of the note, interest and costs; but that said Walker answered therein, denying his liability as endorser, etc., and such suit, as between Heller and Walker, was taken to the Supreme Court of Indiana, where it was then pending; but that the judgment against the appellee Marsh still remained in the Hancock Circuit Court.

And the appellee Marsh further said, that on or about the 10th day of June, 1880, a new agreement was made between himself and said Meredith Walker, wherein it was stipulated that as Walker had been unable to collect from said Dunbar the said half of the sum paid by Walker to the Knightstown bank in 1874, in lifting the joint note of Marsh and Dunbar, the appellee Marsh would allow the same to be deducted from the sum due him from Walker on account of the walnut lumber, that is to say, that instead of making Marsh chargeable with only the moiety, the whole amount of the payment to the Knightstown bank by Walker should be deducted out of the sum due Marsh for the walnut lumber, and that Walker would pay the balance, at that date amounting to about \$750, on the said judgment against Marsh in the Hancock Circuit Court; and that Meredith Walker died on the 10th day of January, 1882, without having made any such payment. Wherefore, etc.

Does this complaint state facts sufficient to constitute a valid claim or cause of action in favor of the appellee Thomas L. Marsh? Does it show any debt due Marsh from or by the

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estate of appellant's intestate, or any promise or agreement by the intestate in his lifetime to pay Marsh any sum of money on account of the walnut lumber, or on any other account? Each of these questions, it seems to us, must be answered in the negative. As against Marsh, it must be held; we think, that the first agreement, in 1874, between him and Meredith Walker, in relation to Walker's application of the agreed price of the walnut lumber, was abrogated and superseded by their subsequent agreement of the 10th day of June, 1880, of and concerning the same subject. In his complaint the appellee Marsh has declared upon this subsequent agreement, and he could not be heard to say in this case that such agreement is invalid and void for the want of a sufficient consideration, or for any other cause. But if it could be said that such subsequent agreement was, for any cause, inoperative and void as to appellee Marsh, and that notwithstanding such agreement, the money mentioned therein, or some part thereof, constituted a debt to Marsh from the estate of the decedent Walker, which Marsh might recover of such estate, the complaint would still be bad on demurrer, because it failed to allege that such money, or any part thereof, was then due the appellee Marsh from the estate of the decedent, and remained unpaid. Although the statute requires only "a succinct and definite statement" of the claim against a decedent's estate (section 2310, R. S. 1881), yet it has been held, and correctly so, we think, that this statement must contain sufficient facts to show *prima facie*, at least, that the estate is indebted to the claimant or plaintiff, or it will be held bad on demurrer for the want of such facts. *Huston v. First Nat'l Bank*, 85 Ind. 21; *Moore v. Stephens*, 97 Ind. 271; *Windell v. Hudson*, 102 Ind. 521. Certainly, where such statement shows a cause of action, if any, in favor of some person other than the claimant or plaintiff in the case, it must be held bad on demurrer for the want of sufficient facts. *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257. We conclude,

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therefore, that the trial court erred in overruling appellant's demurrer to the claim or complaint of the appellee Marsh.

Appellant's counsel next complain in argument of the alleged insufficiency of what may be called the cross-claim of the appellee Moses Heller, against the appellant, as administratrix of the estate of Meredith Walker, deceased, and the original claimant, Thomas L. Marsh. On its face this so-called cross-claim purports to be the verified petition of Moses Heller to be admitted as a party defendant to Marsh's claim against the appellant. After Heller had been made a party defendant, his petition to that end seems to have been treated below, both by court and counsel, as constituting his cross-claim, and we will so consider it. In this cross-claim Heller set out the dealings between Meredith Walker and Thomas L. Marsh, and his connection therewith, substantially in the same language and in the same order as such dealings are stated in the claim of appellee Marsh. As we have given a full summary of the facts stated in Marsh's claim, of course these facts need not be repeated in this connection, but it should be noted that the appellee Heller, in his cross-claim, does not set up or even allude to the second agreement between Marsh and Walker, on the 10th day of June, 1880, as stated in Marsh's claim, in relation to the application of the agreed price of the walnut lumber. After setting out the first agreement between Marsh and Walker, entered into, as alleged, about the beginning of the year 1875, as the same is stated in Marsh's claim, Heller claimed and asked the court to declare that, under such agreement, Meredith Walker became the trustee of Heller for the said sum of money so received by Walker from Marsh on the walnut lumber transaction; and that the appellant, as administratrix of Walker's estate, should be required to pay into court for the use of Heller an amount equal to the sum of money, and interest, so held by Walker as such trustee at the time of his death.

The sufficiency of this cross-claim was not questioned below by demurrer or by a motion in arrest of judgment. But

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the appellant has here assigned as error, that Heller's cross-claim does not state facts sufficient to constitute a cause of action. In discussing this alleged error the first objection urged by appellant's counsel to the sufficiency of the cross-claim is, that it is nowhere alleged therein that the decedent Walker had and retained any part of the \$700 sued for at the time of his death, nor that the appellant, as administratrix, had any part of such sum after the death of Walker, nor at the time of the filing of such cross-claim. We do not think that this objection to the cross-claim is well taken. It was alleged therein that Walker died on the 10th day of January, 1882, without having paid to Heller the money placed in his hands by Marsh, or any part thereof, and that Heller's claim was just, due and unpaid. These allegations are certainly sufficient, after verdict and judgment, to obviate the first objections of appellant's counsel to Heller's cross-claim.

Appellant's counsel also insist that Heller's cross-claim is insufficient, because it is not averred therein that any demand was ever made upon Walker, in his lifetime, nor upon the appellant, as administratrix of his estate, for the application of the \$700 as required by the terms of the aforesaid trust. If it be conceded that an averment of such demand would have been necessary, if Heller had brought suit against Walker in his lifetime, yet it is settled by the decisions of this court that no such averment was necessary in the cross-claim filed by Heller against Walker's estate. In *Wright v. Jordan*, 71 Ind. 1, the court said: "All claims against an estate, whether contingent or absolute, have to be filed against it in the proper court, and the filing of such a claim as the one before us constitutes a sufficient demand against the administrator." To the same effect see the following cases: *Trimble v. Pollock*, 77 Ind. 576; *Emerick v. Chesrown*, 90 Ind. 47; *Stapp v. Messee*, 94 Ind. 423.

No other objections are urged by appellant's counsel to Heller's cross-claim, and we think it is sufficient to withstand appellant's assignment of error thereon.

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The next error complained of in argument is the overruling of appellant's motion for a new trial. This error, we think, is well assigned. Without commenting on the evidence, which would hardly be proper in view of a probable, or at least possible, new trial of the cause, we may say without impropriety that, in our opinion, the evidence fails to sustain the findings of the trial court. It is not a case of the weight of evidence, but of an absolute failure of evidence to support the findings on every material point; but, if it were otherwise, we would be required under the practice of this court to reverse the judgment and award a new trial of the cause, because the record affirmatively shows that the findings and judgment below rest as well upon Marsh's claim, to which a demurrer was erroneously overruled, as upon Heller's cross-claim. In such a case the judgment must be reversed and the cause remanded for a new trial. *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Ethel v. Batchelder*, 90 Ind. 520; *City of Logansport v. La Rose*, 99 Ind. 117.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to Marsh's claim, and the motion for a new trial and for further proceedings.

Filed Oct. 29, 1885; petition for a rehearing overruled Dec. 31, 1885.

No. 12,271.

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104	336
124	430
134	573
134	584
135	666
136	411

104	336
154	27

104	336
170	246

PLEADING.—*Complaint.*—*Transcript of Judgment.*—*Lien on Real Estate.*—*Foreclosure of Lien.*—*Defence or Disclaimer.*—A complaint, averring that the plaintiffs became the owners of certain real estate through the foreclosure of a mortgage executed in 1874, and the purchase of the same by the plaintiffs' ancestor on the sale under the decree in 1879; that in 1877 the defendant filed a transcript of a judgment against the mortgagor in

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the office of the clerk of the circuit court of the proper county, and the same became a junior lien upon the real estate covered by the mortgage, and praying that said judgment lien be foreclosed and forever barred, etc., sufficiently shows that the defendant was asserting such a lien or claim against the land as called for a defence or disclaimer.

JUDGMENT.—*Filing Transcript in Clerk's Office.*—*Justice of the Peace.*—*Lien.*

—*Notice.*—As between parties to a judgment before a justice and others with actual notice, a transcript thereof is a lien on the real estate of the defendant in the county from the time of its filing in the clerk's office.

PRACTICE.—*Defect of Parties.*—*Demurrer.*—*Answer.*—A complaint which does not show upon its face that there is a defect of parties is not bad on demurrer for that cause, and if such defect exists it should be shown by answer.

REVIEW OF JUDGMENT.—*Practice Same as on Appeal.*—The errors that may be made available in an action to review a judgment are the same that may be made available on appeal from the judgment.

SAME.—*Objections to Judgment Must be Made in Trial Court.*—*Default.*—If no objection be made to a judgment, and no motion made to modify it in the trial court, no objection can be made available upon appeal, nor in an action to review, however erroneous the judgment may be; and this rule has been applied to cases where judgment was rendered by default.

From the Marion Superior Court.

W. H. Ripley, for appellant.

F. Rand and *J. M. Winters*, for appellees.

ZOLLARS, J.—On the 21st day of September, 1882, appellees filed a complaint in the court below against appellant. The substantial averments of that complaint may be epitomized as follows: In April, 1874, William John Wallace was the owner of a tract of land, of thirty-seven $\frac{28}{100}$ acres, and mortgaged it to Andrew Wallace to secure a loan of \$5,000, evidenced by five promissory notes. The mortgage was duly recorded, and after record, together with the notes, was duly assigned to John Wymond. Payment not having been made according to the stipulations in the notes and mortgage, Wymond foreclosed the mortgage in April, 1879, and recovered a personal judgment against the mortgagor for the amount of the notes due. The land was sold under the decree on the 7th day of June, 1879, was purchased by Wymond, and he

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received the proper sheriff's certificate. Wymond died before the expiration of the year allowed for redemption. After the expiration of that year, the sheriff made a deed to Wymond's heirs at law, whereby they became the owners of the land. Wymond, at the time of his death, owned other parcels of real estate. The Wymond lands and real estate were partitioned among his heirs after the making of the above mentioned deed, and the real estate embraced in that deed was set off to the heirs, Tycie W. Gibson, Charles F. Wymond and Harvey A. Wymond, appellees herein. It was further averred in the complaint, that, on the 1st day of August, 1877, the defendant filed a transcript of a judgment in the clerk's office of the Marion Circuit Court against said William John Wallace, taken before T. P. Miller, a justice of the peace, on April 11th, 1877, for the sum of \$85.50 and costs, and that the same became a lien upon said real estate junior to said mortgage of William John Wallace and wife to Andrew Wallace and assigned to said John Wymond, but said defendant was not made a party to the said foreclosure suit of said John Wymond against said William John Wallace and others aforesaid, and said judgment lien was not foreclosed in said suit. "Wherefore plaintiffs demand judgment that said judgment lien be now foreclosed and forever barred, and they ask for all proper relief." Copies of the notes and mortgage were filed with that complaint.

To that complaint appellant filed the following demurrer: "Comes now the defendant and demurs to the plaintiffs' complaint herein, and for cause says: It does not state facts sufficient to constitute a cause of action against this defendant. And, also, for a defect of parties plaintiffs, in that the administrator of John Wymond, or all his heirs at law, are not joined either as plaintiff or defendants." The demurrer was overruled and the defendant, appellant herein, excepted. A rule for an answer having been entered, and the defendant, with knowledge of the rule, having neglected to comply with it, was defaulted for want of an answer.

At the same term of court and on the 29th day of November, 1882, the cause was submitted to the court, and the court found that the defendant had the right to redeem the land covered by the mortgage, and to make such redemption by paying into court within ten days the sum of \$5,650, and entered a judgment that if that amount should be so paid in within ten days, the property should stand redeemed from the mortgage sale, and that if not so paid, the defendant's right of redemption should be forever barred and foreclosed. On the 11th day of December, 1882, in the December term of the court, the ten days having expired, and there having been no redemption, the court rendered a final judgment that the mortgage be forever foreclosed, and that the equity of redemption of the defendant (appellant herein) be forever barred, and that it be perpetually enjoined from setting up title to, or lien or claim upon the mortgaged premises; that the plaintiffs' (appellees herein) title to said real estate be forever quieted, and that the plaintiff recover from the defendant their costs, taxed at \$18.70.

Appellant herein filed its complaint in this action for a review of the judgment and proceedings in the above described case, and claims that there are errors apparent upon the face of the record. These alleged errors are specifically set out, but are really all embraced in the following:

"Fourth. The court erred in overruling this plaintiff's demurrer to the complaint.

"Fifth. The court erred in rendering judgment against this plaintiff for the costs in such action, as it was not a necessary party, and no judgment or finding against it was taken or given.

"Sixth. The court erred in rendering the final judgment and decree for a strict foreclosure, and in perpetually enjoining this plaintiff from claiming or setting up any interest, claim or right in said property."

The court below sustained a demurrer to appellants' complaint for review. If the alleged errors did intervene in the

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proceedings in the former case, if they are apparent upon the face of the record, and if appellant is in a position to make them available, the court below should have overruled the demurrer to its complaint for review. Otherwise, the court below properly sustained the demurrer to its complaint for a review, and the judgment must be affirmed.

It is argued here that the complaint in the former cause was insufficient for the reason that it contained no allegation that the defendant had, or claimed to have, any interest or title, or color of interest in the land covered by the mortgage, or that it claimed to have any lien upon the land by virtue of having filed a transcript of a judgment.

That portion of the complaint in relation to the transcript filed by appellant is not a model pleading. It was evidently drawn in great haste, and without much thought of the certainty that should characterize all pleadings. But we think that, considering all the averments of the complaint in relation to the filing of the transcript, it is made to appear that the transcript was the transcript of a judgment against the mortgagor Wallace, and in favor of the defendant, appellant here, the insurance company. The fact that the insurance company had filed a transcript of the judgment, showed sufficiently that it was moving to acquire a lien that might be enforced against the real estate of the judgment defendant and mortgagor, Wallace. The statute provided then, as it does now, 2 R. S. 1876, p. 236, sections 539, 540, R. S. 1881, sections 612, 613, that transcripts of judgments rendered by justices of the peace might be filed in the office of the clerk of the circuit court; that it should be the duty of the clerk forthwith to record the transcript in the order-book, and docket the judgment in the judgment docket, and that the judgment set forth in the transcript should be a lien upon the real estate of the defendant within the county, etc., from the time of filing the transcript. The proper construction of these statutes perhaps is, that as between the parties to the judgment and others with actual knowledge, such transcripts

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are liens from the time of the filing of them in the clerk's office. *Berry v. Reed*, 73 Ind. 235; *State, ex rel., v. Record*, 80 Ind. 348; *Ball v. Barnett*, 39 Ind. 53.

It is averred in the complaint, as we have seen, that the transcript of appellant's judgment was filed in the clerk's office. It is further averred that the judgment became a lien upon the land covered by the mortgage. This averment is somewhat in the way of an averment of a conclusion, but taking all of the averments together, we think that it is sufficiently made to appear that the insurance company had a judgment which, by its acts, it was asserting to be a lien upon the land covered by the mortgage. The complaint, therefore, made such a case as called for an answer, defence or disclaimer by appellant.

The argument is pressed that the complaint shows that there were not sufficient parties plaintiffs. This argument is based upon the theory that the Wymond heirs, having been in possession of the land, were liable to account for the rents. It is a sufficient answer to this to observe that the complaint did not show that all of the Wymond heirs were at any time in the actual possession of the land, nor that the land had any rental value whatever. And as to the point made by appellant, that Wymond's administrator should have been a party, it may be sufficient to observe that it does not appear from the complaint that there was such an administrator, nor that there was a necessity for any. If by any possibility it could have been necessary or proper to have such an administrator a party to the action, that necessity should have been shown by an answer.

The other two questions discussed at length by appellant's counsel are, that the court below erred in rendering judgment against appellant for costs in the former case, and in rendering judgment that appellant should redeem in ten days; and, further, in rendering the final judgment, that as the redemption had not been made within the ten days as fixed by the

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court, appellant's right to redeem should be barred, and it enjoined from setting up any claim or lien under the judgment.

Appellees meet the argument upon these questions, in part, by the contention that as no objections were made by appellant to the judgments complained of, and no motion of any kind made to modify them, appellant is not in a position to now complain; at least, in no position to make any complaint available. This contention can not be disregarded. The rules which govern in actions to review are, in the main, the same that govern in an appeal to this court. The errors that may be made available in an action to review are those that may be made available upon an appeal. *Rice v. Turner*, 72 Ind. 559; *Richardson v. Howk*, 45 Ind. 451; *Buskirk Pr.*, p. 271; *Tachau v. Fiedeldey*, 81 Ind. 54; *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind. 25; *Hardy v. Chipman*, 54 Ind. 591.

It has uniformly been held that if no objection be made to the judgment, and no motion made to modify it in the trial court, no objection can be made available upon appeal, nor in an action to review, however erroneous the judgment may be. This rule has been applied even where judgment was rendered by default. *Barnes v. Wright*, 39 Ind. 293; *Darlington v. Warner*, 14 Ind. 449; *Sturgis v. Rodman*, 14 Ind. 604; *Tachau v. Fiedeldey*, *supra*; *Searle v. Whipperman*, 79 Ind. 424; *Barnes v. Bell*, 39 Ind. 328; *Baldwin v. School City of Logansport*, 73 Ind. 346; *Ludlow v. Walker*, 67 Ind. 353; *Leonard v. Blair*, 59 Ind. 510; *Johnson v. Prine*, 55 Ind. 351; *Evans v. Feeny*, 81 Ind. 532; *McCormick v. Spencer*, 53 Ind. 550; *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 380; *Smith v. Tatman*, 71 Ind. 171; *Powers v. Johnson*, 86 Ind. 298; *Forgey v. First Nat'l Bank, etc.*, 66 Ind. 123; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; *Buskirk Pr.*, p. 268.

In the case before us, the court had the undoubted authority to render a judgment in relation to the costs, and to render a judgment fixing the time and manner of redemption by appellant. If in the rendition of these judgments there was

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any error, a question which we do not now decide, that error is not available in the action to review, for the reasons that they were rendered without objections from appellant, and it at no time made any motion or took any steps in the court below for a correction or modification of the judgments.

It is true that appellant, after its demurrer was overruled, practically abandoned the case, but that abandonment can not be urged by it as a reason for not having made such objections or motions below, and as a reason why it should be allowed to make the objections for the first time upon appeal, or in an action to review. If appellant sought to save questions as to the proceedings in the case, it should have followed the case to the end, and saved the questions. Not having done so, the record presents no question for decision in the action to review, as to the form or substance of the judgments rendered. So far as presented by the record, there is no error that would justify this court in setting aside the judgment in this proceeding for review. The court below, therefore, correctly sustained the demurrer to appellant's complaint in this action.

The judgment is affirmed, with costs.

Filed Dec. 19, 1885.

No. 10,961.

THE CITY OF DELPHI ET AL. v. STARTZMAN ET AL.

CITY.—Annexation of Territory.—One or more citizens of a territory sought to be annexed to a city may maintain a suit to prevent the consummation of an attempted illegal annexation.

SAME.—Non-navigable Stream.—Where only a natural, non-navigable stream intervenes between the territory sought to be annexed and the corporate boundary of the city, that would not alone constitute a barrier to the extension of the corporate limits over territory platted into lots.

SAME.—Jurisdiction of Board of Commissioners.—Where territory, not platted,

104	343
142	515
142	520
104	343
144	60
104	343
149	259
160	173

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is sought to be annexed to a city to which it lies adjacent, the board of county commissioners has exclusive original jurisdiction over the matter, and the city must by petition secure from that body the proper order.

SAME.—Remedy.—Injunction.—Where there has been an attempted illegal annexation of territory to a city, and an attempt on the part of the city to interfere with property rights under such color of legal authority, injunction is the appropriate remedy.

SAME.—Pleading.—Where the complaint states facts sufficient to show a right to have a municipal corporation restrained from exercising corporate powers over a territory not legally annexed to the city, the pleading is not bad because it omits to aver that the treasurer had the tax duplicate in his hands.

REAL ESTATE.—Grantor and Grantee.—A party who has conveyed land cannot do any act that will impair or invalidate the rights of his grantees.

EVIDENCE.—Pleading.—Estoppel.—A party can not give evidence of an affirmative defence of estoppel unless he has pleaded it.

From the Tippecanoe Circuit Court.

J. Applegate and *C. R. Pollard*, for appellants.

J. A. Sims, *G. R. Eldridge*, *L. B. Sims*, *M. Winfield*, *C. E. Taber*, *J. R. Coffroth* and *T. A. Stuart*, for appellees.

ELLIOTT, J.—The material allegations of the appellees' complaint are these: The city of Delphi is a municipal corporation organized under the general law for the incorporation of cities; the appellees are owners of real estate in the town of South Delphi; the city of Delphi has attempted by resolution of the common council to annex the territory within the limits of the town of South Delphi, and has levied taxes against the property of the appellees; the territory sought to be annexed is not contiguous to the city, but is separated by intermediate land, not platted; the appellees have not consented to such annexation, and the plat of the town of South Delphi has never been acknowledged or recorded.

The complaint avers that the suit is brought on behalf of the plaintiffs, as well as of all other property-owners in the territory sought to be annexed, and appellants' counsel argue that the complaint is bad because one or more taxpayers can not maintain such a suit. We deem it only necessary to say of this position, that it is quite clear to our minds that one

or more citizens of a territory sought to be annexed to a city may maintain a suit to prevent the consummation of an attempted illegal annexation. The question is not simply one of relief from taxation, but the question is as to the right to compulsorily change the property of the citizens from the territorial limits of one political corporation into those of another and different corporation. It is, in fact, a question as to the right to supplant one local government by another, and such a question affects the citizens of the entire locality sought to be annexed to a city.

* We have little doubt that there are cases in which property-owners would be estopped from questioning the validity of the existence of the territorial limits of a municipal corporation. There are cases in which corporate boundaries may be extended without direct legislation or express contract. *Strosser v. City of Fort Wayne*, 100 Ind. 443, *vide* authorities cited, p. 452. There are, however, no facts stated in the complaint from which it can be inferred that any right was waived by the appellees, nor are there any facts stated showing that any action was taken by the appellant on the faith of an acquiescence in the attempted annexation. If facts had been alleged showing that the city had acted upon the faith of the appellees' acquiescence, and that serious loss would result from permitting them to change position, the objections to the complaint might, perhaps, have been well founded.

We agree with appellant's counsel that where only a natural stream not navigable intervenes between the territory sought to be annexed and the corporate boundary, it would not constitute a barrier to the extension of the corporate limits over territory platted into lots, but this does not meet the question here, for the complaint avers that there were unplatted lands between the limits of the city and the territory sought to be annexed, and gives the names of the owners. The appellant's counsel mistake the real question here, for they argue with much earnestness in favor of the wisdom and

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policy of extending the limits of cities, and refer us to the cases of *Blanchard v. Bissell*, 11 Ohio St. 96; *Powers v. Commissioners, etc.*, 8 Ohio St. 285. The question is, not as to the policy of making such annexations, but as to the method of procedure. We have a positive statute prescribing what method shall be pursued, and that prescribed must be adopted and no other. *Strosser v. City of Fort Wayne, supra*, authorities cited. Our decisions have uniformly declared that in such a case as this (that is, where the territory is not platted,) the city must petition the board of county commissioners and secure an order from that body. *Taylor v. City of Fort Wayne*, 47 Ind. 274; *City of Peru v. Bearss*, 55 Ind. 576; *Town of Cicero v. Williamson*, 91 Ind. 541; *City of Logansport v. LaRose*, 99 Ind. 117; *Strosser v. City of Fort Wayne, supra*.

Where the law gives to a common council of a city, or to any inferior tribunal, jurisdiction in a designated class of cases, it is invested with general jurisdiction of the subject, and if it determines facts essential to the existence of jurisdiction in a particular instance, its judgment can not be collaterally impeached, provided the particular case belongs to the class over which the tribunal has general jurisdiction, but, where the case does not belong to the general class, then there is no jurisdiction of the subject-matter and no authority to move a step in the case. This is the rule that governs here. This case does not belong to the class over which the common council has jurisdiction; on the contrary, it belongs to a class over which the board of commissioners has exclusive, original jurisdiction. *Strosser v. City of Fort Wayne, supra*.

We regard the complaint as seeking, not merely to restrain the collection of taxes, but also as seeking to prevent the city from carrying into effect the illegal order for the annexation of the territory within which the appellees' lots are situated. There is, therefore, an attempt to interfere with property rights under color of legal authority, and injunction is the appropriate remedy. *Erwin v. Fulk*, 94 Ind. 235; *Kyle v.*

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Board, etc., 94 Ind. 115; *City of New Albany v. White*, 100 Ind. 206.

Where the complaint states facts sufficient to show a right to have a municipal corporation restrained from exercising corporate powers over territory not legally annexed to the city, the pleading is not bad because it omits to aver that the treasurer had the tax duplicate in his hands. The case is not like that of a proceeding simply seeking to enjoin a treasurer from levying taxes, nor is it like the case of an officer seeking to defend a seizure of goods for taxes, and this consideration excludes the applicability of such cases as *Wise v. Eastham*, 30 Ind. 133, *Anthony v. Sturgis*, 86 Ind. 479, and *Pugh v. Irish*, 43 Ind. 415.

The second paragraph of the answer of the appellant alleges that the plats mentioned in the complaint were acknowledged and recorded. The reply to this paragraph avers that the acknowledgment was not made until after the parties by whom it was made had parted with all title. We think it perfectly clear that a party who has conveyed the land can not do any act that will invalidate or impair the rights of his grantees.

There was no answer pleading an estoppel or a ratification, and it was proper to exclude evidence tending to establish such a defence. A party can not give evidence of an affirmative defence of estoppel unless he has pleaded it. *Robbins v. Magee*, 76 Ind. 381.

Judgment affirmed.

Filed Dec. 29, 1885.

No. 12,460.

WELCH v. THE STATE.

CRIMINAL LAW.—*Murder.—Indictment.*—An indictment for murder, which charges that one W. did, on, etc., at, etc., feloniously, etc., kill and murder one F., by then and there feloniously, etc., striking him, the said

104	347
180	189
104	347
145	215
104	347
151	513

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F., upon his head with a dangerous and deadly weapon, to wit, a large, heavy club, which he, the said W., had and held in his hands, is sufficient, although the words "then and there" are omitted after the name of the defendant as last set out.

SAME.—Evidence.—Impeachment of Witness.—A witness in a criminal case can not be impeached by showing that out of court he had expressed an opinion as to the defendant's guilt, which on cross-examination he denies.

SAME.—Where a witness for the defendant in a criminal case testifies to matters on cross-examination which are merely collateral to the main inquiry, it is not competent for the prosecuting attorney to contradict or impeach such statements.

SAME.—Evidence.—Until the State has introduced evidence tending to show that the defendant had left his neighborhood for the purpose of avoiding arrest, it is incompetent for the defendant to introduce testimony showing his intention and purpose when he so left.

From the Monroe Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellant.

J. E. Henley, Prosecuting Attorney, and *W. P. Rogers*, for the State.

MITCHELL, J.—The indictment in this record charges, with proper formality, that on the 4th day of January, 1885, William Welch did feloniously, etc., kill and murder one Louis Fedder, by then and there feloniously, etc., "striking him, the said Louis Fedder, upon his head, with a dangerous and deadly weapon. to wit, a large, heavy club, which he, the said William Welch, had and held in his hands."

The only objection made to the indictment is that by the omission of the words "then and there," after the name of the accused as last above set out, it fails to allege that the defendant had the club in his hand at the time of the beating and striking. Within the ruling in *Dennis v. State*, 103 Ind. 142, there is no force in this objection.

The accused was found guilty of murder in the first degree, and his punishment fixed at imprisonment for life. His conviction rests largely, if not entirely, upon the testimony of one Matthew James, whose evidence relates wholly to alleged confessions or admissions made by the defendant to him.

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Besides the testimony of James and some criminating circumstances of more or less weight, the evidence of the alleged confession, as detailed by this witness, is not altogether free from suspicion, and the circumstances under which it is said to have been made, and the not altogether unblemished reputation of the witness, as it is made to appear in the record, detract somewhat from the force and reasonableness of the confession as related by him. Notwithstanding this, considering the other circumstances which appear since the jury have passed upon it, we should hesitate to disturb their finding on the evidence.

The witness testified that the defendant made admissions to him indicative of his guilt, in the presence of Andrew Cooper and Charles Young. Both of these persons were called as witnesses for the defence, and both denied having heard anything of the kind testified to by James.

Cooper having testified on his direct examination that he heard no confession made by the defendant to James, and no talk between them about the murder of Fedder, was asked on cross-examination by counsel for the State this question: "I will ask you if, in the barber shop of William Profit, here in Bloomington, you did not say there that morning that you knew Bill Welch was the man that killed Louis Fedder."

To this question the appellant objected, for the reason that it was asking the witness for an opinion expressed by him out of hearing of defendant, and was not asking for a fact, and was not a cross-examination, which objection was overruled, and defendant excepted, and the witness answered, "I did not."

The State then asked the witness: "And if you did not say there that you were willing to bet \$250 that Bill Welch was the guilty man?"

To this question the appellant again objected, for the reason stated. The objection was again overruled, and the witness answered, "I did not."

The State then called Wm. Profit, and asked him the fol-

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lowing question: "State to the jury whether you heard him (Andy Cooper) make the remark that 'William Welch, or Bill Welch, is the man who murdered old man Fedder; I am not guessing at it, I know it.'"

To this the appellant objected, for the reason that the question was illegal and incompetent, and was hearsay evidence, and was an effort to impeach a witness on irrelevant and immaterial matter, and that the question referred to the opinion of an outside party, which objection the court overruled, and appellant excepted, and the witness answered, "Yes; he said that."

The State then asked the witness the following question: "I will ask you if he said then at the same time and place, 'I will bet,' or 'I am willing to bet \$250 that he is the man.'"

To which question the appellant again objected, for the same reasons, which objection was again overruled, and defendant excepted, and the witness answered, "Yes, sir; he said that."

The same questions were asked the witness, Harry Innes, by the State, to which the appellant objected for the same reasons.

These rulings of the court were presented, among others, as causes for a new trial.

We know of no principle or authority upon which to maintain the rulings of the court in admitting the testimony of Profit and Innes.

The conversation about which inquiry was made of Cooper on cross-examination was so remotely, if at all, connected with the subject of his direct examination and of the matter in issue, that the rule was put to its utmost tension in allowing the question to be asked him, over the defendant's objection. *McIntire v. Young*, 6 Blackf. 496.

As, however, if the witness had admitted that he made the declarations imputed to him by the cross-examining question, such admission might have formed the basis for further inquiry as to the sources of his knowledge, or the grounds

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upon which he based his opinion of the guilt of the accused, with a view of driving him ultimately to an admission that he heard the alleged confession, we think it was within the discretion of the court to allow the question.

Having denied the imputed declarations, we think the State was bound by the denial. The subject about which the witness was inquired of was new and collateral to the main issue. *Seller v. Jenkins*, 97 Ind. 430. It did not come within the rule that a witness may be shown to have made statements out of court inconsistent with his testimony given upon the trial. The conversation or declarations imputed to him had no relation, except by argument or inference, to the testimony given by the witness on his examination in chief. They were not contradictory of his testimony as given, nor were they inconsistent with it, so as to become the subject of an impeachment. 1 Whart. Ev., sections 558, 559; *Seller v. Jenkins*, *supra*.

This case is complete in its analogy with that of *People v. Stackhouse*, 49 Mich. 76. In that case a witness was examined on behalf of the accused, who was on trial for the crime of arson. On cross-examination, she was asked if she had not said to certain persons named, on the night the accused was arrested, that she always did suspect that he did burn the mill. Having denied the imputed conversation, two witnesses were called who testified that she had so stated. Reversing this ruling the court said: "The opinion or suspicions of the witness out of court, although inconsistent with the conclusion which the facts she testifies to on the trial would warrant, can not be made the basis of an impeachment. This is so firmly settled by the authorities that the question can not be considered an open one."

Whether the matter inquired of on cross-examination, and proved by the State in impeachment of Cooper, was collateral to the main inquiry or not, is determined by this inquiry: Would the prosecuting attorney have been permitted to introduce it in evidence as part of the State's case? If he

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would not, it was collateral.' If it was collateral, it was not competent to contradict it. 1 Whart. Ev., section 559; *George v. State*, 16 Neb. 318; *State v. Townsend*, 24 N. W. Rep. 535; *Sumner v. Crawford*, 45 N. H. 416; *Moore v. People*, 108 Ill. 484.

In 1 Greenleaf on Evidence, section 449, the rule is stated thus: "And, if a question is put to a witness which is collateral or irrelevant to the issue, his answer can not be contradicted by the party who asked the question; but it is conclusive against him."

In Starkie on Evidence, page 200, the author says: "It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterward impeaching his testimony by contradicting him."

In 1 Wharton on Evidence, section 559, the learned author says: "In order to avoid an interminable multiplication of issues, it is a settled rule of practice, that when a witness is cross-examined on a matter collateral to the issue, he can not, as to his answer, be subsequently contradicted by the party putting the question."

The ruling of the court in admitting this evidence, and other rulings admitting evidence of like character, were such errors as must reverse the judgment.

In the fifth reason assigned for a new trial is also included an alleged error of the court in excluding the evidence of James Kelley, a witness for appellant.

When James Kelley was on the witness stand, the counsel of appellant asked him to state what he knew of the intention of the defendant to leave Bloomington, and for what purpose, etc. To this question the State objected, for the reason that it was hearsay; counsel for defendant stated that the defendant proposed to show that the defendant and this witness had a conversation as to his going away to the Air-Line Railroad to get a job of work, instead of going away to avoid a prosecution; that the defendant made his going away public, and that he made known his intention and pur-

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pose to five or six other witnesses; and that he went to get work, and got work. The court sustained the objection, and appellant excepted.

Concerning the evidence thus proposed, it may be said the record fails to show that the State had introduced evidence tending to show that the defendant left Bloomington under circumstances which might indicate a purpose to avoid arrest and prosecution.

Until some evidence was introduced by the State upon which a claim of flight or evasion of arrest might have been based, the evidence offered was immaterial. It may have been excluded for that reason. We need not decide whether under any circumstances such evidence is competent. *Hamilton v. State*, 36 Ind. 280 (10 Am. R. 22); *Austin v. Swank*, 9 Ind. 109; *Boone County Bank v. Wallace*, 18 Ind. 82.

The application for a new trial, so far as it was asked on the ground of newly discovered evidence, need not, in view of the fact that for the reasons already given the judgment must be reversed, be further noticed.

Judgment reversed, with directions to the clerk to make the proper order concerning the further custody of the defendant.

Filed Dec. 15, 1885.

No. 12,229.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. GRANTHAM.

SUPREME COURT.—*Supersedeas Brief.*—*Discussing Questions Arising in Record.*

—Where appellant, in his *supersedeas* brief, not only points out the error or errors upon which he relies, as required by rule 16 of the Supreme Court, but also discusses the questions arising thereon fully and elaborately, he is entitled to have such questions, if properly saved and presented by the record, considered and decided without filing an additional brief.

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BILL OF EXCEPTIONS.—*Omission of Evidence.*—*Supreme Court.*—Where a bill of exceptions, purporting to contain all the evidence given in a cause, shows on its face that it does not, the Supreme Court will not consider or decide any question which depends for its decision upon the evidence.

INSTRUCTION TO JURY.—*Incomplete Instruction.*—*Exception to.*—*How Saved.*—To make an exception to an instruction, which states the law correctly as far as it goes, available for the reversal of a judgment, because of what it omits to state, instructions covering the omitted points must be requested and refused by the court.

SAME.—*How Considered.*—Instructions must be considered with reference to each other and as an entirety; and a judgment will not be reversed simply because one of the instructions, standing alone, may seem to be imperfect or incomplete.

From the Clay Circuit Court.

G. W. Friedley, for appellant.

J. J. Smiley, W. G. Neff and G. A. Knight, for appellee.

HOWK, J.—In this case the appellee, Grantham, sued the Louisville, New Albany and Chicago Railway Company, appellant, in the Putnam Circuit Court, in a complaint of three paragraphs. The object of the suit was to recover damages for alleged injuries to two horses and three mares, owned by and the property of the appellee, and each of a certain specified value, which injuries to such animals, it was alleged, were caused by a locomotive engine and train of cars, owned and operated by the appellant on the line of its railway in Putnam county. In the first paragraph of his complaint appellee stated his cause of action under the provisions of the statute making a railway company liable for the killing or injury of animals by its locomotives or cars on its railroad tracks, unless its road is securely fenced in.

In the second paragraph he alleged that his horses and mares were injured by appellant's locomotive and cars, by and through the negligence of its employees and servants in running its train, and without any fault or negligence on his part.

In the third paragraph of his complaint he charged that

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his horses and mares were wilfully injured by the employees and servants of the appellant, who had at the time the control and management of its locomotive and train of cars.

Appellant answered by a general denial of the complaint, and of each paragraph thereof, and the cause being at issue, on its application, the venue thereof was changed to the court below. There the issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages at five hundred dollars. Over appellant's motions for a new trial, and in arrest, the court rendered judgment on the verdict.

In this court appellant has assigned a number of errors, but of these only one is noticed even by its learned counsel in his brief of this cause, namely, the overruling of its motion for a new trial. Of course, under the settled practice of this court, the other errors assigned by appellant, but not discussed by its counsel, are regarded here as waived, and are not considered. *Goldsberry v. State, ex rel.*, 69 Ind. 430; *Williams v. Potter*, 72 Ind. 354; *Coffin v. Trustees, etc.*, 92 Ind. 337.

At the time the appellant perfected its appeal in this cause, by filing the record thereof in the office of the clerk of this court, it filed therewith what is called its "*supersedeas* brief," for the purpose of obtaining a *supersedeas* from the court, or one of the judges thereof. This brief was filed by appellant in compliance with the last clause of rule 16 of the rules of this court, as adopted May 14th, 1884, which reads as follows: "An application for a *supersedeas* must be accompanied by a brief, referring to the record by pages and lines, and pointing out the error or errors upon which the appellant relies." Such a brief is widely different from the brief which our decisions have uniformly required of the appellant on the final hearing of the appeal. Thus, in *Parker v. Hastings*, 12 Ind. 654, the court said: "In America, at least in Indiana, a brief, in addition to the statement of the case above mentioned, should contain a summary of the points or questions involved, with a citation of authorities, if authorities are relied

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on, and an argument based upon both, which should be characterized by perspicuity and conciseness; though, says Bouvier, 'when the argument is pertinent and weighty, it can not be too extended.' " For the want of approximately, at least, such a brief as is here defined, many appeals have been dismissed by this court, or the judgments appealed from have been affirmed. *Bennett v. State, ex rel.*, 22 Ind. 147; *Deford v. Urbain*, 42 Ind. 476; *Gardner v. Stover*, 43 Ind. 356; *Harrison v. Hedges*, 60 Ind. 266; *Bray v. Franklin Life Ins. Co.*, 68 Ind. 6; *Millikan v. State, ex rel.*, 70 Ind. 283; *Wilson v. Holloway*, 70 Ind. 407; *City of Anderson v. Neal*, 88 Ind. 317; *McCann v. Rodifer*, 90 Ind. 602; *Kaster v. Kaster*, 93 Ind. 581; *Arbuckle v. Biederman*, 94 Ind. 168; *Pratt v. Allen*, 95 Ind. 404; *Robbins v. Magee*, 96 Ind. 174.

Usually, where a *supersedeas* brief is filed, the appellant afterwards files a further or additional brief, wherein he states the points or questions presented by the alleged errors, of which he complains, cites the authorities, if any, upon which he relies, and makes his argument. But this has not been done by the appellant, in the case in hand. But, in appellant's *supersedeas* brief, its counsel has not only pointed out "the error or errors upon which appellant relies," as required by rule 16 of the rules of this court, but he has also discussed therein the questions arising under such error so fully and ably that appellant is entitled to have such questions, in so far as they are properly saved in and presented by the record, considered and decided.

We have said that the only error noticed by appellant's counsel, in his brief of this cause, was the overruling of the motion for a new trial. Under this error, it is earnestly insisted on behalf of appellant, that the verdict of the jury was not sustained by sufficient evidence. It is claimed, however, by appellee's counsel, that, under our decisions, the question of the sufficiency of the evidence to sustain the verdict can not be considered here, because the bill of excep-

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tions shows on its face that all the evidence given in the cause is not in the record. This point seems to be well taken. A map or diagram of appellant's railroad and its surroundings, at and near the places where appellee's animals were injured, and shown to be a correct map, was in evidence as exhibit A, and filed in the cause. This map was not copied in the bill of exceptions, but in the place where it ought to have been copied the clerk has certified that it was "not on file." It is settled by a long line of our decisions that although the bill of exceptions concludes with the usual formula, "this was all the evidence given in the cause," yet if, on the face of the bill, there is an apparent omission of such evidence, this court will not consider or decide any question which depends for its proper decision upon the evidence in the cause. *French v. State, ex rel.*, 81 Ind. 151; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Collins v. Collins*, 100 Ind. 266; *Jennings v. Durham*, 101 Ind. 391. Besides, it seems to us that there is evidence in the record which tends to sustain the verdict on every material point, and in such case, where the verdict has met the approval of the trial court, we have often decided that the judgment will not be reversed on the evidence. *Fitzgerald v. Goff*, 99 Ind. 28, and cases cited.

Complaint is also made by appellant's counsel, in argument, of the second instruction to the jury, given by the court of its own motion, as follows: "The first paragraph of the complaint is based upon a statute of the State which requires railroad companies operating roads in the State to securely fence in the tracks of their roads. A railroad company, operating a railroad in this State, is required to securely fence in its track, and, where this is not done, the railroad company so operating the road is liable for all damages done to stock by its locomotives and cars, while being operated upon its road, without regard to the question whether such injury was the result of wilful misconduct or negligence, or the result of unavoidable accident."

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So far as this instruction goes, it states the law correctly as applicable to the first paragraph of complaint, to which it was expressly limited. If it was objectionable at all, it was on the ground of what it omitted to state, and if it had been the only instruction of the court in relation to the case stated in first paragraph of complaint, it would have been justly open to the criticism of appellant's counsel. But, even in that case, it would have been incumbent on the appellant, under our decisions, to have requested the court to give an instruction covering omitted points, before it could make its exception to the defective instruction given available as error for the reversal of the judgment. *Taggart v. McKinsey*, 85 Ind. 392; *Ireland v. Emmerson*, 93 Ind. 1 (47 Am. R. 364); *Fitzgerald v. Goff*, *supra*.

Again, we have often decided that the court's instructions to the jury must be taken and considered here with reference to each other and as an entirety. Thus considering the court's instructions in this cause, we are of opinion that they gave the jury the law, fairly and correctly, applicable to the case before them, as made by the pleadings and evidence. In such a case, we can not reverse the judgment below simply because one of the instructions, standing alone and separate from its fellows, may seem to be imperfect or incomplete. *Lytton v. Baird*, 95 Ind. 349; *Stout v. State*, 96 Ind. 407; *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

We have found no error, in the record of this case, which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Dec. 31, 1885.

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No. 12,379.

STITZ v. THE STATE.

CRIMINAL LAW.—Arson.—Evidence.—Impeachment.—Motive.—Under an indictment for arson, where the crime is alleged to have been committed for the purpose of defrauding an insurance company, which had issued a policy of insurance upon the building burned, it is competent for the State to give in evidence a claim made by the defendant for the property destroyed, and to prove that he put a value upon it in excess of its real worth, not for the purpose of impeaching the character of the accused, but as tending to show a motive to commit crime.

SAME.—Impeachment of Character.—Character can not be impeached by evidence of specific facts.

SAME.—Explanation of Motives.—Instruction.—Facts tending to show evil motives are always susceptible of explanation, and where the State, in an arson case, has offered evidence showing an over-valuation of the property burned, the accused is entitled to an instruction, that if the over-valuation was the result of an error of judgment or of a mistake of fact, it was not necessarily evidence of a wicked motive or criminal intent.

SAME.—Reasonable Doubt.—Instruction.—An instruction that "while each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal," is erroneous.

From the Jasper Circuit Court.

S. P. Thompson and *R. P. DeHart*, for appellant.

M. H. Walker, Prosecuting Attorney, and *E. P. Hammond*, for the State.

ELLIOTT, J.—The indictment upon which the appellant was convicted charges him with the crime of arson, and charges, also, that the crime was committed for the purpose of defrauding the Phenix Insurance Company, which had issued a policy of insurance upon the building burned.

The State was permitted to give in evidence a claim made by the appellant for property destroyed by the fire, and to prove that he put a value upon the property beyond its real worth. We regard this evidence as competent. We do not, however, agree with the counsel for the State, that it was competent for the purpose of impeaching the character of the accused; on the contrary, we regard the theory of the counsel

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for the State upon this point as radically erroneous. Character can not be impeached by evidence of specific acts. This familiar principle shatters the theory of the State. In proceeding upon this theory counsel were led into serious error in their argument to the jury, and the court followed them to the manifest injury of the appellant.

We put our ruling on the ground that the evidence was competent, as tending to show a motive to commit the crime. If an accused has a policy of insurance on his property, and claims from the insurer more than the property is worth, it supplies some evidence of a wicked motive. If a man should claim, under oath, one thousand dollars for property of no greater value than one hundred dollars, that fact would supply some evidence tending to establish a motive for setting fire to the building in which it was situated. It would, however, be a mere circumstance to be considered in connection with other facts. Of itself, it would not be of great weight, but it would nevertheless be some evidence of a criminating character. The law recognizes the principle that men are impelled to commit crimes from some motive. There are, indeed, few motiveless crimes, and among the motives impelling men to crime is that of gain. In a thoughtful and philosophical treatise it is said: "As there must pre-exist a motive to every voluntary action of a rational being, it is proper to comprise in the class of moral indications such particulars of external relation as are usually observed to operate as inducements to crime," and among the motives that influence human conduct this author classes that of gain. *Wills Circ. Ev.* 39.

Another author says: "In looking at the motives which instigate human conduct, we ascend to the very origin of crime." *Burrill Circ. Ev.* 281. At another place this author says: "The motive of gain, in the stricter sense of the term, may be excited by two different classes of objects; first, by something visible and tangible, which the party meditating the crime desires to possess; and, secondly, by some substan-

tial benefit which is expected to accrue as the result of the contemplated act." *Ibid.* 285.

The case of *State v. Cohn*, 9 Nev. 179, supplies an illustration of the practical application of these principles. In that case the appellant was charged with arson, and it was held that evidence of over-large insurance upon his goods was competent "to show a possible or probable motive, such motive being a material link in the chain of circumstances." In the course of the opinion in that case it was said: "Now, it is not a natural thing for a man to fire his own premises: presumptively appellant was innocent. What then is the logical and natural course of human thought at such a juncture? Is it not to inquire what motive, if any, existed which could have influenced a sane person to do such an act? Such was the course pursued by the prosecution; the motive was sought; and by it claimed to be found in the fact of an undue insurance; not only a perfectly proper proceeding, but indeed the only one open." The same principle is declared in *Commonwealth v. Hudson*, 97 Mass. 565, and in *Shepherd v. People*, 19 N. Y. 537. In this last case DENIO, J., speaking for the court, said: "The prisoner's house had been burned and he was charged, upon circumstantial evidence, with having set it on fire. *Prima facie* he had no motive for the act, but a strong pecuniary one against it. But if he had a contract of indemnity, and especially if under it he might probably obtain more than the value of the property, the case would be quite different."

Mr. Bishop says: "Evidence that the insurance was for more than the worth of the building is pertinent; also, that the defendant attempted to procure payment of what was thus excessive." 2 Bishop Crim. Proc., section 50. These cases are in harmony with the general rule which that author thus states: "Hence proof of motive is never indispensable to a conviction. But it is always competent against the defendant." 1 Bishop Crim. Proc., section 1107. Wills Circ. Ev. 41; *Goodwin v. State*, 96 Ind. 550, see p. 560.

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While it is competent to prove facts tending to show an evil motive, yet such facts are always susceptible of explanation. Motive is but a circumstance, and it is always proper to explain the act which is adduced as evidence of a wicked motive. This is true of the present case. If the valuation of the property was made by mistake, or was a mere honest error of opinion, the probatory force of the fact that there was a claim made for a value greater than the actual one would be materially weakened, if not entirely destroyed. It is not uncommon for men to place too great a value on their own property, and an error in doing so is not necessarily a criminating circumstance. *Citizens, etc., Ins. Co. v. Short*, 62 Ind. 316. The accused was entitled to an instruction that if the over-valuation of the property was the result of an error of judgment or of a mistake of fact, it was not necessarily evidence of a wicked motive or criminal intent. Our opinion is that the court erred in refusing the instruction asked by the appellant upon this point.

The court gave to the jury this instruction: "While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." This instruction is palpably erroneous. There can be no conviction of a crime unless all the jurors are satisfied beyond a reasonable doubt of the guilt of the accused. The law upon this point is firmly settled. The instruction before us in effect reverses this rule, for it informs the jury that "such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." This must have induced the jurors to think that unless all concurred in entertaining a reasonable doubt, the verdict should be against the defendant. This is in direct opposition to the rule declared by our decisions. *Castle v. State*, 75 Ind. 146; *Clem v. State*, 42 Ind. 420 (13 Am. R. 369). This instruction is essentially different from the one passed upon in *Fassinow v. State*, 89 Ind. 235.

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A reasonable doubt entertained by some of the members of the jury may not compel an acquittal, but it may so strongly prevail, and among so many, as to warrant others in yielding their opinions and joining in a verdict of acquittal. At all events, an instruction which indicates, as the one under immediate mention does, that individual jurors should not acquit, unless all the members of the jury entertain doubts of the defendant's guilt, is erroneous. It may possibly be that in a case where the evidence satisfactorily shows the guilt of the accused, there should be no reversal for such an error as that committed in giving the instruction; but, however this may be in other cases, in such a case as this, where the evidence is far from satisfactory, we can not disregard the error committed in giving the instruction under examination.

There are other instructions given which we deem erroneous, but we do not think it necessary to discuss them, for the judgment must be reversed for the errors pointed out.

Judgment reversed, with instructions to issue the proper order for the return of the appellant.

Filed Dec. 31, 1885.

No. 12,340.

KRATLI ET AL. v. LARREW ET AL.

TOWN.—*Taxes.—Time of Levy.—Statute Construed.—Amendment by Implication.*—Section 3348, R. S. 1881, in force since August 17th, 1855, requiring the board of trustees of an incorporated town to determine the amount of general tax for the year before the third Tuesday in May, is amended by implication by section 3262, R. S. 1881, in force since March 10th, 1879, and such tax may be determined within a reasonable time after the adjournment of the county board of equalization. See sections 6389 and 6398, R. S. 1881.

SAME.—The words "determine the amount of general tax for the current year," as used in section 3348, R. S. 1881, mean the final determination of the board as to the amount, assessment and levy.

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From the Starke Circuit Court.

A. I. Gould and W. A. Foster, for appellants.

J. D. McLaren, for appellees.

HOWK, J.—In this court the appellants, Kratli and the town of Knox, the defendants below, have assigned errors upon the record of this cause which call in question the conclusions of law stated by the trial court upon its special finding of facts.

The facts found by the court were in substance as follows:

1. On the 20th day of December, 1883, the plaintiffs were the owners of the property mentioned in the complaint, and had possession thereof.

2. On said 20th day of December, 1883, one Sylvester Bertram, marshal of the town of Knox (defendant), took such property from the plaintiffs, under a precept or warrant then in his hands, for the purpose of collecting certain corporation taxes against the plaintiffs that appeared by the tax-list of such town for the year 1883 to be due, but delinquent and unpaid.

3. The said marshal, after taking such property in custody, placed the same in the care of the defendant Kratli to be fed and taken care of until it should be sold to pay such taxes.

4. On the 21st day of December, 1883, the plaintiffs brought their action in replevin against the defendant Kratli for the possession of such property, said Kratli having failed to deliver such property to plaintiffs, on demand before suit brought, and a writ of replevin was issued and placed in the hands of the sheriff of Starke county.

5. The same day the sheriff took such property, by virtue of the writ of replevin, and the defendants herein, within twenty-four hours, executed and delivered to such sheriff the proper bond, entitling them to retain possession of the property, which they did, until the 31st day of December, when such property was sold by the marshal of the defendant, the town of Knox, to pay the taxes aforesaid.

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6. The property replevied was worth, the day it was replevied, eighty-five dollars in the market.

7. The plaintiffs used the mare in question as a livery animal at the time she was taken from them, and to them she had a particular value by reason of her excellence for such purpose, and was worth to them the sum of \$125.

8. The corporation taxes for the town of Knox, for the year 1882, to enforce the payment of which the property was taken by the marshal of the defendant, the town of Knox, were not levied, laid or assessed, on or before the third Tuesday in May of that year, but were levied and assessed after that time, to wit, on the 27th day of May, 1882.

Upon the foregoing facts the court stated the following conclusions of law:

1. The levy and assessment of the corporation tax of the town of Knox for the year 1882 is and was illegal and void.

2. The process, under and by virtue of which the marshal of the defendant, the town of Knox, took such property, was irregular, illegal and void, and the levy and taking by such marshal was unlawful and void.

3. The property mentioned and set out in the complaint was the property of the plaintiffs at the time of the issuing of the writ and commencement of this suit, and they were entitled to the possession thereof.

4. The property was of the value of \$85 at the time of the commencement of this suit.

5. The plaintiffs should recover from the defendants the value of the mare, to wit, \$85, together with six per cent. interest thereon from December 20th, 1883, together with the sum of \$11 damages, in all the sum of \$108.22.

As the contrary was not found by the court in this case, we assume that the appellant, the town of Knox, was incorporated under the general law of this State for the incorporation of towns. *Town of Brazil v. Kress*, 55 Ind. 14. In section 3348, R. S. 1881, of this general law, in force since

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August 17th, 1855, it is provided as follows: "The board of trustees shall, before the third Tuesday in May of each year after the town shall have been incorporated, determine the amount of general tax for the current year; but the tax for the year in which the town is incorporated may be determined, at any time, by the board of trustees." This section of the statute was considered by this court in *Town of Williamsport v. Kent*, 14 Ind. 306, where, after setting out the section, the court said: "As we construe the provision to which we have referred, the words 'determine the amount of general tax for the current year,' mean the final determination of the board as to the amount, assessment, and levy of taxes for the current year. And this construction being correct, it follows that the board had no power to order the assessment and levy, in this case, after the third Tuesday of May." The case cited was approved and followed in *Huntsman v. City of LaPorte*, 15 Ind. 357, and in *Clark v. Town of Noblesville*, 44 Ind. 83.

At the time the cases cited were decided, the general law of this State for the incorporation of towns provided for the election of an assessor in each incorporated town, and made it the duty of such assessor to assess all property liable to taxation in such town, and to make return of his assessment roll to the board of trustees, "on or before the second Tuesday in May of each year." 1 R. S. 1876, p. 882, section 31. In section 3262, R. S. 1881, in force since March 10th, 1879, it is provided, however, that "The office of assessor * * * in incorporated towns in this State shall be abolished, and the assessment of personal and real property, as made and returned by the township assessors to the county auditor, as is now provided by law, * * * in incorporated towns shall constitute the assessment for taxation for * * * town purposes, in like manner as for county and State taxes. And the * * * town clerks shall have access to the assessor's books in the county auditor's office, and they shall transcribe, therefrom, on

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their tax duplicates, an accurate list of the taxable property assessed in each * * * town, as it appears to have been equalized by the county board of equalization, and thereon compute the taxes levied by the * * town authorities."

But, under section 6389, R. S. 1881, the township assessors are not required to return their assessment lists or books to the county auditor "before the first Monday of June annually;" and, under section 6398, R. S. 1881, the county board of equalization is required to "meet, for the purposes of equalization, at the room of the county commissioners, in the court-house of each county, on the first Monday of June, annually."

It will be readily seen that the necessary effect of section 3262, above quoted, is to so amend by implication the provisions of section 3348, *supra*, as that the board of trustees of an incorporated town may, within a reasonable time after the adjournment of the proper county board of equalization in each year, "determine the amount of general tax for the current year." It was so held by this court in *Worley v. Harris*, 82 Ind. 493, and a re-examination of the question has led us again to the same conclusion. For the reasons given we are of opinion that, upon the facts specially found, the trial court erred in its conclusions of law.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court to set aside its conclusions of law, and, in lieu thereof, to find for appellants, the defendants below, as its conclusion of law, and render judgment accordingly.

Filed Nov. 17, 1885; petition for a rehearing withdrawn Jan. 20, 1886.

 Johnson v. Stephenson et al.

No. 12,310.

JOHNSON v. STEPHENSON ET AL.

SUPREME COURT.—*Appeal.—Practice.*—Appeals to the Supreme Court, in all civil cases, are perfected by filing a transcript with the clerk, which transcript must be filed within one year from the time of the rendition of judgment; and where the transcript is not filed within that time, the appeal will be dismissed, though the proper notice of appeal has been served within the year.

From the Owen Circuit Court.

J. C. Robinson, I. H. Fowler, A. W. Fullerton, S. O. Pickens and *W. A. Pickens*, for appellant.

D. E. Beem and *W. Hickam*, for appellees.

ZOLLARS, J.—Judgment was rendered in the court below, on the 3d day of April, 1884. On the 27th day of March, 1885, appellant served notices of an appeal upon appellees and the clerk of the circuit court. The transcript was filed in the office of the clerk of this court, on the 30th day of April, 1885. It will thus be seen that the notices of an appeal were served before, and the transcript filed in this court after, the expiration of one year from the rendition of the final judgment below.

For this reason, appellees move to dismiss the appeal. Appellant resists this motion upon the ground that the appeal was taken by the service of the notices. He relies upon the first portion of section 640, R. S. 1881, and rule 23 of this court.

Section 640, *supra*, must be considered and construed in connection with the other sections of the statute upon the same subject. Section 633 provides that appeals to this court, in all cases, must be taken within one year from the time the judgment is rendered. Section 631 is in harmony with it.

Previous to the enactment of these sections, such appeals might be taken within three years from the rendition of the judgment. The idea of the Legislature doubtless was, that one year is sufficient time in which to appeal, and all that

104	368
147	136

104	368
149	98

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should be allowed, in justice to the judgment creditor. The party from whose judgment an appeal may be taken is interested in having the question of appeal settled, so that he may rely upon the stability of his judgment. All judgment creditors are alike interested.

It can hardly be supposed that the Legislature, in providing for appeals to this court, intended to provide that if an appeal is taken under one section of the statute, it must be perfected by the filing of a transcript within one year from the rendition of the judgment, but if taken under another section, the transcript may be filed after the expiration of the year. To give the statute such a construction would be to hold that an appeal may be perfected within the year or not, as the judgment defendant and appealing party may choose, by taking his appeal under any particular section of the statute.

Evidently, all judgment creditors are upon an equality, and all alike have the right to demand that appeals from their judgment shall be perfected within one year from their rendition, by the filing of the transcripts, so that the cases may go to the court for decision.

If parties intending to appeal may delay perfecting their appeals by failing to file the transcripts, and thus delay the final decision of the cases, by taking the appeals under the first branch of section 640, *supra*, it will follow, practically, that appeals of the least merit, and that ought to be speedily disposed of, will be the longest delayed. If delay may be thus brought about by appealing under the first branch of that section, parties desiring delay only would in every case thus appeal under that section.

Section 640 provides for appeals after the term. It is as follows: "After the close of the term at which the judgment is rendered, an appeal may be taken by the service of a notice in writing on the adverse party or his attorney, and also on the clerk of the court in which the proceedings were

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had, stating the appeal from the judgment or some specific part thereof; or such appeals may be taken by procuring from the clerk of the court a transcript of the record and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the Supreme Court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee." It will be observed that whether the appealing party serves the notices upon the adversary and clerk or files the transcript, and the clerk issues the notice, this section makes no provision as to when the transcript shall be filed in the office of the clerk of the Supreme Court. To ascertain that fact we must look to section 633, *supra*, which fixes the time within which all appeals in civil actions must be taken. If that section does not fix the time within which transcripts must be filed, when the appeals are after the term and under section 640, *supra*, the time is not fixed at all.

Under the latter part of section 640, the appeal is taken by filing the transcript. Under section 633, that appeal must be within a year from the time the judgment is rendered. *Harshman v. Armstrong*, 43 Ind. 126.

It is provided in the criminal code, that appeals must be taken within one year after the judgment is rendered, and that such appeals may be taken by the service of notices in a manner similar to that provided in the former part of section 640, *supra*; but it is also provided that the transcript may be filed within ninety days after the appeal is thus taken. R. S. 1881, sections 1885, 1887; *Winsett v. State*, 54 Ind. 437.

Section 640, *supra*, as we have seen, contains no such provision as to when the transcript shall be filed. It neither limits the time of filing the transcript within, nor extends it beyond, the year within which appeals may be taken. If the Legislature intended that in any case transcripts in civil actions may be filed after the year, doubtless such provision would have been made, as in the criminal code.

There must be a transcript filed at some time, in order to

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have a perfected appeal. This court can not pass upon a case until the transcript is filed and regularly brought before it. If, under section 640, the transcript may be filed twenty-seven days after the expiration of the year, as in this case, when the notices are served as in the first branch of that section provided, there would seem to be no reason why the transcript might not be filed six months later. Appeals in civil actions must be taken within one year, and such appeals must be perfected appeals, which include the filing of the transcript. Section 633 applies as well to appeals taken under the first branch of section 640, as to those taken under the second branch, and in both cases requires the appeal to be perfected within the year by the filing of the transcript. Whether or not the service of the notices under the first branch of that section works an appeal in any sense, or for any purpose, until the transcript is filed, or whether or not when the transcript is filed the appeal dates from the service of the notices, are questions which we need not now decide, but we are quite clear that the service of the notices alone does not constitute the appeal that section 633 requires to be taken within one year.

Rule 23 of this court provides that where an appeal is taken after the term, by notices as provided in the first branch of section 640 of the code (which is the same as section 556, 2 R. S. 1876, p. 241), the transcript must be filed within sixty days from the time of the service, or the appeal so taken will be deemed to have been abandoned. This rule does not extend the time for filing the transcript beyond the year, nor was it attempted thereby to so extend the time. In the adoption of the rule, the court was not attempting to do what belongs to the Legislature. This is all apparent from the rule itself. There would be a possibility, and probability, of evil consequences resulting, if the appealing party might serve notices of an appeal shortly after judgment, and have the whole year in which to perfect the appeal by filing the transcript. In the long delay the other party might mislay the

notice served upon him, and forget that such a notice had been served, and thus the case, as to him, might go by default. It was to prevent such a result, doubtless, that the rule fixes the limit at sixty days. The sixty days thus fixed by the rule is a limitation, and not an extension.

Appellant's counsel cite *Hollensbe v. Thomas*, 22 Ind. 375, *Gumberts v. Adams Ex. Co.*, 28 Ind. 181, *Day v. Herod*, 33 Ind. 197, *Barnett v. Gilmore*, 33 Ind. 199, *State, ex rel., v. Cressinger*, 88 Ind. 499, in support of their contention that there may be an appeal before the filing of the transcript. These cases involve appeals from boards of county commissioners and justices of the peace. Such appeals rest upon statutes very different from those authorizing appeals to this court. In bringing appeals here the appellant must procure the transcript and see that it is filed. In appealing from county boards and justices of the peace, the appealing party has nothing to do but to demand an appeal, and file his bond within the proper time. When he has done this, the law makes it incumbent upon the auditor in one instance, and upon the justice of the peace in the other, to make out and file a transcript with the county clerk. When the appealing party has demanded an appeal, and filed his bond, he has done all that the law requires of him, and all that he can do; hence, so far as he is concerned, he has taken an appeal. He can not be made to suffer by the laches of the auditor or justice of the peace in failing to file the transcript. This is what the above cases decide. They are not controlling here, for the reason, as we have before said, that in appealing to this court it is incumbent upon the party appealing to see to it that the transcript is filed in time. That duty is imposed upon no one else.

It follows from our conclusions above expressed that this appeal must be dismissed. The appeal is, therefore, dismissed, at appellant's costs.

Filed Dec. 31, 1885.

Proctor v. Cole.

No. 11,802.

PROCTOR v. COLE.

JUDGMENT.—*Contempt.*—*Estoppel.*—A proceeding against a party for contempt in violating a restraining order does not involve the merits of the legal controversy between the parties, and it is only where the merits are involved that a judgment will operate as an estoppel.

EVIDENCE.—*Declarations of Assignor of Promissory Note.*—The declarations of an assignor of a promissory note, made after he has parted with title and possession, are not admissible against his assignee.

PROMISSORY NOTE.—*Bona Fide Holder.*—*Nominal Consideration.*—The mere nominal consideration of one dollar is not sufficient to constitute a person a *bona fide* holder of a note.

SAME.—*Equitable Assignment.*—As against one who has a prior equitable assignment, a party who has paid merely a nominal sum for a promissory note, and agreed to pay a sum equal to the half of the proceeds that he may realize from it, is not a good faith holder of the note.

SAME.—*Set-Off.*—*Mutuality.*—Mutuality is essential to the validity of a set-off, and the claim asserted as a set-off must be held by the party who pleads it, and not by him and another jointly.

SAME.—*Equitable Consideration.*—*Husband and Wife.*—*Parent and Child.*—The promise of a husband, who has borrowed money from his wife, to pay it to her children, is an equitable consideration which will support the assignment of a promissory note from the husband to one of such children.

HUSBAND AND WIFE.—*Contract to Repay Money Borrowed from Wife.*—*Performance.*—*Equity.*—A husband may not only voluntarily perform a contract to repay money borrowed from his wife, but equity will compel performance.

PARENT AND CHILD.—*Promissory Note.*—*Assignment.*—*Consideration.*—A son may lawfully assist his father in conducting a litigation with his money, time and services, and a debt so incurred by the father will constitute a valid consideration as against his creditors for the transfer of a promissory note to the son.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

J. H. Baker and *F. E. Baker*, for appellee.

ELLIOTT, J.—The appellant's complaint alleges that three promissory notes were by him executed to Henderson Cole, on the 31st day of January, 1880; that, on the 25th day of February, 1880, he purchased of Mrs. S. A. Wells a note ex-

104	378
134	191
104	378
135	331
104	378
135	646
135	607
104	378
149	161

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executed by Henderson Cole; that at the time he purchased this note he had no notice that Henderson Cole had transferred any of the notes executed to him by the appellant; that, on the same day, he brought suit against Henderson Cole and obtained an order restraining him from transferring any of the notes; that after the order had been served on Henderson Cole he endorsed the notes to the appellee, who received them with knowledge of the appellant's defence and of the restraining order.

The complaint, as originally drawn, charged that the appellant filed a complaint and affidavit against Henderson Cole and the appellee, asserting that they had violated the restraining order; that the parties named appeared and attempted to show cause why they should not be punished; that such proceedings were had that the court adjudged that Henderson Cole and Erastus B. Cole were guilty of a contempt of court in violating the restraining order, and that they should both be placed in custody until they turned over to the clerk the notes or their proceeds. On motion of the appellee, that part of the complaint which sets forth the proceedings relative to the arrest and punishment of the appellee and Henderson Cole was struck out.

It is contended with great earnestness, that the ruling on the motion to strike out part of the appellant's complaint was erroneous. The argument upon this point rests on the assumption that the order of the court adjudging the appellee and Henderson Cole guilty of contempt adjudicated the question of the right of the former to enforce collection of the notes assigned to him. This assumption is groundless. An order declaring a party guilty of contempt is not such a judgment as concludes him from maintaining an action upon a claim asserted against the party at whose instance the attachment for contempt was issued. A proceeding against a party for contempt does not involve the merits of the legal controversy, and it is only where the merits are involved that a judgment will operate as an estoppel. Bigelow Estoppel,

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37; Freeman Judgments, sections 325, 326; Wells Res Adjudicata, section 440.

In proceedings against a party for contempt, the controversy between the litigants can not be determined, for there can be no issue formed that will enable the court to pronounce a judgment upon the merits. The jurisdiction to punish contempts is given for the purpose of enforcing the orders of the court and of securing that respect which the law intends that it shall command. The object of punishment is not to adjudicate upon private controversies, but to vindicate the authority and dignity of the court. A party may be guilty of contempt and yet possess a clear legal right, and in adjudging him guilty of contempt the court does not and can not adjudicate upon his legal rights. The investigation in such a case stops when it is ascertained that a contempt was committed, and nothing more is or can be concluded by the order of the court. It is not simply because a proceeding in a matter like that set forth in the rejected part of the complaint is summary or special that a judgment is not conclusive, but because in such a matter no judgment can be rendered that will determine the rights of the parties.

The facts developed by the evidence are substantially these: On the 23d day of February, 1880, Henderson Cole assigned the notes executed to him by the appellant to the appellee. The assignment was not written on the notes, but was contained in a separate instrument. At the time the assignment was written, the notes were in the hands of the attorney of the assignor for safe-keeping, and an order was drawn on the attorney to deliver them to the appellee. The restraining order was issued in a suit brought by the appellant against Henderson Cole to restrain the transfer of the notes, and was served on him on the night of the 25th of February; on the morning of the 26th, before the appellee obtained possession of the notes, he was informed that some sort of a suit had been instituted against his assignor by the appellant. On the day last mentioned, the appellee obtained possession of the

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notes, and they were then endorsed to him in due form. The appellant, on the 25th day of February, 1880, two days after the assignment of the notes executed by him, obtained from Mrs. S. A. Wells a note executed by Henderson Cole, the appellee's assignor; for the note acquired from Mrs. Wells, the appellant paid one dollar and agreed to give her a sum equal to half of whatever sum he might realize from the note.

On the trial the appellant offered to prove statements made by Henderson Cole, the appellee's assignor, on the 25th day of February, 1880. The court did right in excluding these statements. The declarations of an assignor made after he has parted with title and possession are not admissible against his assignee. In this instance there was a written instrument transferring title, and as the notes were in the possession of an agent, the agent held the notes after the transfer for the person to whom they were assigned. Both title and possession, therefore, passed to the assignee. The case falls fully within the rule that the declarations of the assignor made after assignment are not competent against the person to whom the assignment transferred title. *Harcourt v. Harcourt*, 89 Ind. 104; *McConnell v. Hannah*, 96 Ind. 102.

What we have said on the motion to strike out part of the complaint disposes of the question presented by the offer to introduce in evidence the record of the proceedings in the matter of the contempt prosecuted against the appellee and his assignor.

It is argued that commercial notes can not be transferred so as to cut off a *bona fide* set-off acquired before the maker of the notes had notice of the transfer unless there has been a regular transfer by endorsement. We do not regard the appellant as a *bona fide* holder of the note transferred to him by Mrs. Wells, for the reason that he had not paid value before notice of the transfer. Our cases have steadily held that in order to constitute a person a *bona fide* holder of a note, or a *bona fide* purchaser of property, it must appear that he paid value before notice of the equities of the party who asserts a

claim to the note or property. *Anderson v. Hubble*, 93 Ind. 570 (47 Am. R. 394, and authorities cited); *Anderson v. Wilson*, 100 Ind. 402. The consideration of one dollar is a mere nominal one, and a nominal consideration does not make the person who pays it a purchaser for value. The agreement to pay one-half the proceeds that might be realized is a venture approaching very near a mere wagering contract; at all events, it is not such an agreement as will create a right against prior equities.

The counsel for appellant argues that the appellee must suffer defeat because he was not a purchaser for value and the owner of a legal title to the notes before the appellant obtained the note pleaded as a set-off. So far as the argument assumes that the appellee was not a holder for value, it rests upon an erroneous assumption of fact, and so far as it asserts that unless he was a holder for value he can not defeat the appellant's set-off, it cuts against the counsel with fatal effect. We agree that if the appellee is not a holder for value he can not defeat an equitable set-off, and we accept as correct the doctrine of the cases of *Heck v. Fink*, 85 Ind. 6, and *Murray v. Ballou*, 1 Johns. Ch. 566; but we do not agree that he did not have a prior equity, for we are clear that he did have an equity that only a set-off acquired in good faith, without notice, and for a valuable consideration, can defeat. The assignment to him was an equitable one, and vested in him as the assignee an equitable title that can not be defeated except by one holding either superior or prior legal or equitable rights. *Board, etc., v. Jameson*, 86 Ind. 154, see p. 165. For the reason that the appellant's claim is later in point of time, and was not acquired for a valuable consideration paid before notice of the assignment, he can not prevail against the prior and superior equities of the appellee.

In the case of *Tinly v. Martin*, 80 Ky. 463, the question decided was in principle precisely the same as that involved in the case in hand, and the court there said, of such a contract as that made by the appellant with Mrs. Wells, that

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"Such contracts ought not to be favored by either the chancellor or common law judge; but where the debtor is alone involved, it may be that he will not be heard to complain for being compelled to discharge a debt he justly owes." The holding in that case was, that "A court of equity, where the rights of others than the obligor in the note intervene, will not sanction such a speculation by aiding the party making the venture to defeat a clear and acknowledged equity." In principle the case of *Clafin v. Dawson*, 58 Ind. 408, is the same as the case referred to, and it is strongly in point in the present case.

The note which the appellant seeks to make available is not his sole property, if, indeed, he has any property in it at all. He agreed with Mrs. Wells that he would pay her half the proceeds that should be realized, "either directly by collection, or indirectly by way of set-off." This left in Mrs. Wells a real and substantial interest in the claim. "Equity," as the old maxim says, "looks through form to substance," and the substance of this agreement is, that Mrs. Wells shall receive one-half of the proceeds of the note. The nominal title to the note is in the appellant, but at least half of the real interest in the note is in Mrs. Wells. The nominal title of the appellant is but the shadow, while the right to the proceeds of the claim is the substance. A mere shadow does not vest a real interest; the substance carries the interest. The language used in *Clafin v. Dawson, supra*, applies here with great force. "It would be a strange perversion, as it seems to us," said the court in that case, "of the equitable grounds in which the law of set-off had its origin, to give judicial sanction to the appellant's claim in this case to set off the Perry account against the appellee's cause of action. The appellant never 'held' the account assigned to him by Perry as the actual and unqualified owner thereof; and, as we construe the provisions of our code on the subject of set-off, the object and purpose thereof were the protection and defence of the *bona fide* owners of cross-demands." The assignment

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of the note relied on as a set-off did not make the appellant the real party in interest, as to the entire proceeds of the note; the utmost that can be granted is that he became the owner of one-half of the proceeds, and no more. If Mrs. Wells was entitled to one-half the proceeds she is to that extent a real party in interest. *Board, etc., v. Jameson, supra*, and authorities cited.

Conceding, but by no means deciding, that the appellant has a real interest in one-half of the avails of the note obtained from Mrs. Wells, he is still not in a position to defeat the appellee. This we affirm, because he can not use a note in which another has an interest as a set-off. Our decisions are uniformly to the effect that the claim asserted as a set-off must be held by the party who asserts it, and not by him and another jointly. Mutuality is essential to the validity of a set-off. *Griffin v. Cox*, 30 Ind. 242; *Booe v. Watson*, 13 Ind. 387; *Blankenship v. Rogers*, 10 Ind. 333; *Johnson v. Kent*, 9 Ind. 252; *Carter v. Berkshire*, 8 Blackf. 193; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. 146. There are cases where the want of mutuality will not defeat a set-off; but such cases are those, and those only, in which it is necessary to allow the set-off in order to prevent irremediable injustice. *Cosgrove v. Cosby*, 86 Ind. 511; *Wulschner v. Sells*, 87 Ind. 71, see p. 75. This is not such a case, for the equities are strongly against the appellant, who holds by virtue of a contract not favored in law the claim asserted as a set-off, and urges it against one who has the clear prior equity arising from an equitable assignment.

It is insisted that under the statute a set-off will prevail against a mere equitable assignment, and we are referred to *Le Due v. First Nat'l Bank*, 16 N. W. Rep. 426, and *Bone v. Tharp*, 18 N. W. Rep. 906, and to section 276 of the code. We do not deem it necessary to decide this question, although it is argued by appellee's counsel, who refer to *Hankins v. Shoup*, 2 Ind. 342; *Beard v. Dedolph*, 29 Wis. 136; *Baker v. Arnold*, 3 Caines, 279; 1 Parsons Notes and Bills, 278,

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and Daniel Neg. Inst., section 745. Whatever may be the law on this subject the appellant is not in a situation to defeat the appellee, for, as we have already shown, the equities of the latter are prior in point of time and superior in rank. Counsel refers us to *City Bank of New Haven v. Perkins*, 29 N. Y. 554, *Sullivan v. Bonesteel*, 79 N. Y. 631, and *Rogers v. Squires*, 98 N. Y. 49, and, building upon these cases, argues that it is no concern of the appellee whether the title to the note pleaded as a set-off is good or bad. We think otherwise. The appellee is not, as in the cases cited, the maker of the note, but is an assignee endeavoring to make good his claim against the maker of the note, and it is the maker who is endeavoring to defeat the assignee. Whether the maker can make good his set-off depends upon how he acquired the note pleaded as a set-off and the character of his title to it, so that the question vitally concerns the appellee.

Judgment affirmed.

MITCHELL, C. J., did not take any part in the decision of this case.

Filed Oct. 29, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—It is assumed by the counsel of the appellant, that we did not correctly understand or state the effect of the contract between his client and Mrs. Wells respecting the purchase of the note executed by Henderson Cole. The counsel is in error. We did understand, and we do still understand, that the agreement was to pay one dollar to Mrs. Wells and a sum equal to one-half of the amount that might be realized directly by collection or indirectly by way of set-off from the note assigned to the appellant. We thought, and do still think, that a real, substantial interest was left in Mrs. Wells. She was the party, not the appellant, who would be the loser of a substantial sum in the event of the failure of his scheme, for all that the latter actually put in jeopardy was the trifling sum of one dollar. It

is perfectly clear that there was an actual and real interest in Mrs. Wells, since success would yield her a large sum and defeat keep it from her; while all the actual loss that defeat would entail upon the appellant would be the insignificant sum he had paid her.

The discussion in our former opinion was not addressed to the question of what interest qualified a party to prosecute an action as plaintiff, for no such question was involved. The question we were there discussing was: What interest must the maker of a promissory note, who seeks to defeat an action prosecuted by the equitable assignee of that note, show in a promissory note executed by the plaintiff's assignor, in order to entitle him to make it available as a set-off? We said in our former opinion that "We do not regard the appellant as a *bona fide* holder of the note transferred to him by Mrs. Wells, for the reason that he had not paid value before notice of the transfer." This was the real point in the discussion, and we do not deem it necessary to again review the authorities or discuss the question, but adhere, without doubt of its correctness, to our decision upon this point. To our minds it appears incontestably true that, as against one who has a prior equitable assignment, a man who has paid a purely nominal sum for a promissory note and agreed to pay a sum equal to the half of the proceeds that he may realize from it, is not a good faith holder of the note. Although the technical title to the whole of the note was in the appellant, still, in equity, the substantial interest in one-half of it was in Mrs. Wells, at least as against one possessing such prior rights as the appellee did possess; the only doubt is, whether as against such an equitable assignee as the appellee, the appellant has any interest at all in the note. If, however, one-half interest was in the appellant and the other in Mrs. Wells, then, under the authorities cited, the appellant, even if he had been a good faith holder of the one-half, could not have used it as a set-off because of the absence of the essential element of mutuality. The question, as we said

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in our previous opinion, is not between the maker of the note and the payee, but between the maker and an equitable assignee of the payee, and the material inquiry is, what must the maker show to defeat the prior and superior equities of the assignee? It seems plain to us that in order to defeat the claim of such an assignee the maker of the note must show, not simply a technical right to the note he asserts as a set-off, but a clear equity or right to all the note. In this respect the appellant fails; he does not show a clear equity to all the note he asserts as a set-off. A court of equity will examine the merits of a transaction, and will give heed to the substance and not the form, and when this is done here it will be found that the appellant is not, in equity, a good faith purchaser of the whole interest in the note, if, indeed, he is a purchaser of any interest at all as against one claiming through a prior equitable assignment. Reflection has strengthened our confidence in our conclusion that, as against an equitable assignee such as the appellee is, the appellant acquired an interest in the note assigned to him by Mrs. Wells to the extent of only one dollar, and, as this is but a nominal sum, all the interest that he acquired was a nominal one. Of course, we do not mean to say, nor have we said, that this would be the rule if the maker were defending on the ground of want of interest in the plaintiff; that, as we said in our former opinion, is not the question here; the question here is, what are the rights of one who has paid a nominal consideration for a promissory note as against an equitable assignee?

It is said by counsel that the appellee paid no consideration for the assignment to him. The evidence is flatly and directly against counsel upon this point. Henderson Cole, the appellee's assignor, borrowed of his wife \$3,500, and promised to pay it to her children. The notes were assigned to the appellee pursuant to this promise, and to secure a debt of \$800 due him. The promise to the wife was undeniably an equitable consideration, and an equitable consideration will

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support a contract. *Goff v. Rogers*, 71 Ind. 459; *Brown v. Rawlings*, 72 Ind. 505; *Wills v. Ross*, 77 Ind. 1, p. 8 (40 Am. R. 279); *Sedgwick v. Tucker*, 90 Ind. 271, see p. 281. The authorities upon this subject are collected in an article entitled *Equitable Consideration*, 15 Central L. J. 386, and will be found to fully sustain our conclusion.

Appellant's counsel is greatly in error in assuming that a husband may not perform a contract to repay his wife money borrowed from her under an express promise to pay it to her. Equity will not only sustain the husband in performing such a promise, but it will coerce him into performance. *Kelly Cont. of Mar. Women*, 61, 62; *Schouler Dom. Relations*, section 191; *Sims v. Ricketts*, 35 Ind. 181 (9 Am. R. 679).

The wife of Henderson Cole had a right to contract with her husband that the money lent him should be paid to her children. All the elements of a valid contract were present, the consideration, the parties, and the agreement. The fact that the beneficiaries of the promise were the children of the person who advanced the consideration does not change the legal aspect of the case.

Creditors can not compel a husband to reduce his wife's choses in action to possession. *Poor v. Hazleton*, 15 N. H. 564; *Marston v. Carter*, 12 N. H. 159; *Arnold v. Revault*, 1 Brod. & B. 443; *Barlow v. Bishop*, 1 East, 432; *Dennison v. Nigh*, 2 Watts, 90; *Skinner's Appeal*, 5 Pa. St. 262; *Parks v. Cushman*, 9 Vt. 320; *Short v. Moore*, 10 Vt. 446; *Probate Court v. Niles*, 32 Vt. 775; *Godbold v. Bass*, 12 Rich. 202; *Arrington v. Screws*, 9 Ired. 42; *McClanahan v. Beasley*, 17 B. Mon. 111; *Winslow v. Crocker*, 17 Maine, 29; *Partridge v. Havens*, 10 Paige, 618; *Andrews v. Jones*, 10 Ala. 460.

This doctrine is founded on solid principle, and is in close harmony with that declared in the cases cited from our own reports. If the appellant had been a creditor of Henderson Cole at the time the agreement was made by the latter with his wife, he could not have compelled him to take her money

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from her; and much less reason has he for asserting a right to do so when it appears that he did not become a creditor until after the husband had performed his agreement.

A son may lawfully assist his father in conducting a litigation with his money, his time and his services. *Bacon Abridg. Title Maintenance 413; Board, etc., v. Jameson, 86 Ind. 154, see p. 162.*

The debt incurred by the father to the son was a just one, and he had a right to repay it. The consideration was a legal and a meritorious one. This consideration would alone have supported the transfer of the notes to the appellee. If the father chose to pay his debt to the son by transferring to him the notes executed by the appellant, he had a right to do so, and the transfer could only be impeached by showing fraud on the part of both the father and the son. No such fraud was shown, and the transfer must stand, for the rule is rudimentary that where a valuable consideration is paid for property, the transfer will be upheld unless it is shown that both the assignor and assignee participated in a fraudulent scheme to defraud creditors or other persons.

Petition overruled.

Filed Jan. 20, 1886.

No. 12,705.

BIRD v. THE STATE.

CRIMINAL LAW.—*Personal Appearance Not Evidence of Age.*—*Instruction to Jury.*—In a prosecution for allowing a minor to play the game of pool, an instruction to the jury that, "In determining whether or not the defendant believed this man was of the full age of twenty-one years, you will take into consideration all the evidence in the case, the opinions of the witnesses as to his age, and, in connection with that, you may take into consideration his appearance, as developed whilst testifying on the stand before you," is erroneous.

From the Hancock Circuit Court.

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C. G. Offutt, R. A. Black, I. P. Poulson and W. F. McBane, for appellant.

F. T. Hord, Attorney General, *G. W. Duncan*, Prosecuting Attorney, and *W. B. Hord*, for the State.

Howk, J.—In this case, the indictment charged, in substance, that the appellant, James Bird, and one Albert J. Ross, at Hancock county, on the 19th day of March, 1885, being the owners and having the management and control of a certain pool-table, did then and there unlawfully allow, suffer and permit one Harlan Haskell, a minor, to play pool upon such table with Henry Bucy, Morton Davidson and James L. Vail, contrary to the form of the statute, etc.

Upon the arraignment of the defendants and their plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding the appellant Bird guilty as charged in the indictment; and assessing his punishment at a fine in the sum of ten dollars, and finding the defendant Ross not guilty. Over appellant's motions for a new trial and in arrest, the court rendered judgment on the verdict against the appellant Bird for the fine assessed and costs.

In this court errors are assigned by the appellant upon the overruling (1) of his motion to quash the indictment, (2) of his motion for a new trial, and (3) of his motion in arrest of judgment.

In their brief of this cause the appellant's counsel say: "The first and only question, to which we desire to call the attention of this court, arises under the second assignment of error, viz.: The court below erred in overruling appellant's motion for a new trial." By this statement of his counsel the appellant abandons the first and third errors assigned by him, and withdraws them from the consideration of this court.

In their brief appellant's counsel further say: "Among the causes assigned for a new trial, in the motion therefor, is the following, viz.: '3d. Because the court erred in giving

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to the jury, of its own motion, instruction numbered six, to the giving of which the defendant objected and excepted at the time.' The sixth instruction, to which the appellant excepted, reads as follows, to wit: '6. In determining whether or not the defendants believed this man was of the full age of twenty-one years, you will take into consideration all the evidence in the case, the opinions of the witnesses as to his age, and, in connection with that, you may take into consideration his appearance, as developed whilst testifying on the stand before you.' "

It is earnestly insisted on behalf of the appellant that this instruction, in so far as it authorized the jury in determining the question whether or not the defendants believed that Harlan Haskell was of the full age of twenty-one years, to "take into consideration his appearance, as developed whilst testifying on the stand," in the presence of the jury, in connection with "all the evidence in the case" as to his age, does not state the law correctly as applied to this case. This is the only question we are required to consider and decide in this cause. If the instruction quoted is erroneous, the judgment must be reversed; but if it states the law correctly, the judgment must be affirmed.

It is admitted by appellant's counsel, that "the evidence for the State proves that the prosecuting witness, Harlan Haskell, played pool at the appellant's saloon with the persons named in the indictment, and that Haskell at the time was under the age of twenty-one years." After making this admission, appellant's counsel say: "The defence was and is that the prosecuting witness, Harlan Haskell, at the time he played the game of pool as aforesaid, stated his age to be over twenty-one years; that he had the appearance of a man over the age of twenty-one years; that the appellant at the time believed he was over the age of twenty-one years, and so believing, in good faith, suffered and permitted him to play pool," etc.

It is claimed, on behalf of the appellant, that "the ap-

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pearance of Harlan Haskell, as developed whilst testifying on the stand before the jury," was not such evidence as the jury had the right to take into consideration, in determining any question in this cause, because it was impossible to make such "appearance" a part of the record, by bill of exceptions or otherwise. In this view of the question under consideration, appellant's counsel seem to be sustained by a number of our own decisions. In *Stephenson v. State*, 28 Ind. 272, the defendant was prosecuted for a violation of the *Sunday* law. To sustain a conviction, it was necessary that the court, as the trier of the facts, should find that the defendant was over the age of fourteen years at the time of the commission of the offence. On appeal to this court, it appeared by the evidence in the record, that no proof whatever was offered as to the defendant's age, but the trial judge certified that he held that, as the defendant, who was before the court in person, presented to the court the appearance of a full grown man, such proof was not necessary. It was held by this court that the age of the accused, in such a case, must be proved by sworn testimony, and that the court or jury could not determine this fact for themselves from the personal appearance of the accused. The court there said: "Our statute gives the defendant in a criminal case, upon conviction, the right to present, by bill of exceptions, all the evidence given in the cause for review in this court. If the judge or jury trying a criminal cause may determine from the personal appearance of the defendant whether or not he be over (or under) a certain age, without hearing evidence, either as to the age or its indications, it will, so far as that issuable fact is involved, deprive the defendant of this right of review. It is true, that in this case, we have the statement of the judge to supply the want of evidence, but the judge was not a witness, and the State is not entitled to avail itself of his knowledge, except upon matters of which the court takes judicial notice. * * * It seems to us, that it is but reasonable, in a criminal proceeding, to require the State to re-

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sort to the ordinary course of proof to establish every material fact charged in the indictment."

The case cited has been fully approved in the following more recent decisions of this court: *Ihinger v. State*, 53 Ind. 251; *Robinius v. State*, 63 Ind. 235; *Swigart v. State*, 64 Ind. 598. In these latter cases, instructions very similar to the instruction under consideration, in the case in hand, were disapproved by this court.

In *Ihinger v. State*, *supra*, the trial court had instructed the jury, as follows: "The mere fact that a minor represents himself to be twenty-one years old, is not of itself sufficient to excuse the sale. A mere child might make such representation, yet any person of common sense would know the statement to be untrue. The real question is, whether the defendant in making the sale acted in good faith.

"1. Did the defendant use reasonable caution in making the sale?

"2. Was the witness's personal appearance such as would indicate that he was twenty-one years old?

"In determining this question, you should look at his entire personal appearance; first, his size; second, the appearance of his face. Did he have a beard or not, together with his whole general appearance, should be regarded by the jury in determining the question of good faith on the part of the defendant."

The foregoing instruction was there held to be erroneous, and, in commenting thereon, the court said: "Was it competent for the jury thus to look upon Carmichael, and from such inspection of him, either with or without other evidence of his age, determine whether or not the defendant acted in good faith in selling him the liquor? We think not. Whether or not the defendant acted in good faith depended upon whether he had reasonable ground to believe, and did believe, that Carmichael was twenty-one years of age. This might have depended, in part at least, upon the appearance

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of the latter as to age. And, doubtless, evidence would have been competent to show the appearance of the witness as to age. But we know of no principle of law that would permit the jury to pass upon the age of the witness by his appearance to them. There is no mode of putting such evidence upon the record in order that it may be passed upon by an appellate tribunal. On a motion for a new trial in the court below, the judge would have to substitute his impressions, as to the appearance of the witness as to age, for those of the jury."

In *Robinius v. State*, *supra*, the action of the trial court complained of was thus stated in the bill of exceptions: "The court, without being requested thereto by the counsel for the State, or by any one else, having personally inspected the appearance of the witness, Edward Geisendorff, who was present in court and testified as a witness, took his youthful appearance into consideration, in determining the question of the defendant's guilt or innocence, to which the defendant at the time objected and excepted."

After citing our previous decisions, hereinbefore cited, the court said: "In these cases it was held, in substance, and we think correctly, that the personal appearance of a party or witness can not be considered by court or jury as evidence, in determining the question of the age of such party or witness."

In view of our decisions in the cases cited, we feel constrained to hold in the case in hand, that the trial court erred in instructing the jury that in determining whether or not the defendants believed the prosecuting witness was of the full age of twenty-one years, "they might take into consideration his appearance, as developed whilst testifying on the stand before them." We may add, that if the question under consideration could be properly considered an open one, some of the members of this court, as at present constituted, would be inclined to take a different view of such question from that expressed in our previous decisions and here approved and followed. For the error of the court in the instruction

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quoted, the appellant's motion for a new trial ought to have been sustained.

The judgment is reversed, and the cause remanded for a new trial.

Filed Dec. 10, 1885; petition for a rehearing overruled Feb. 20, 1886.

104	300
104	75
104	300
104	498
104	380
163	300

 No. 12,189.

NIETERT v. TRENTMAN ET AL.

JUDGMENT.—*Default.*—*Complaint for Relief Against.*—*Excuse for Non-Appearance.*—*Failure to Serve Summons May be Shown Notwithstanding Sheriff's Return.*—In a proceeding under the statute (section 99, 2 R. S. 1876, p. 82; section 396, R. S. 1881) to set aside a default and to be relieved from a judgment, the plaintiff may show, as an excuse for not appearing to the action in which he was defaulted, that the summons was not in fact served upon him, and that he had no notice of the pendency of the action, or of the rendition of the judgment, notwithstanding the fact that the sheriff's return shows service by reading. *Nichols v. Nichols*, 96 Ind. 433, limited. ELLIOTT and HOWE, JJ., dissent.

From the Allen Circuit Court.

S. R. Alden, for appellant.

H. Colerick and *W. S. Oppenheim*, for appellees.

NIBLACK, J.—This was a proceeding upon a complaint to have a default set aside and to be relieved from a judgment, under section 99, 2 R. S. 1876, p. 82; see, also, R. S. 1881, section 396. The complaint was filed on the 19th day of April, 1875, and some proceedings, with both parties before the court, were had upon it, but, apparently owing to the loss of the original papers, further proceedings were, after a time, suspended until the 21st day of February, 1885, when a substituted complaint was filed. This substituted complaint avers that, on the 5th day of February, 1875, August C.

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Trentman, as the surviving partner of the firm of B. Trentman & Son, filed his complaint in the Allen Circuit Court against one Henry Nietert and the appellant, Christian Nietert, upon a promissory note for \$263.10, purporting to have been executed by the said Henry Nietert and the appellant, and upon an open account charging a joint indebtedness against the same persons in the sum of \$626.31; that on the same day a summons was issued upon that complaint and returned by the sheriff "served by reading to Henry Nietert and Christian Nietert, this February 5th, 1875;" that afterwards, on the 15th day of February, 1875, a default was entered against the said Henry Nietert and the appellant, because of their failure to appear to the action, and on the next day judgment was rendered against them upon the note for \$315.70 and upon the account for \$626.31; that the summons issued in said action was never really served upon him, the appellant; that he never received notice of any kind or from any source of the pendency of that action, or of the rendition of said judgment until an execution was issued and served upon him; that the appellant was only surety upon the note sued on, and had fully paid that part of the judgment which rested upon the note before the commencement of this proceeding; that he had and still has a good and meritorious defence to so much of the action as was based upon the open account, in this, that he was never liable for any part or item of that account; that the goods charged for in its several items were sold solely and only to his co-defendant Henry Nietert, to whom alone credit was at the time given; that by reason of the facts herein charged the appellant's apparent neglect in not appearing to the action and setting up his defence was excusable. Wherefore the appellant demands that the default and judgment be set aside, and that he be permitted to make his defence to so much of the action as involves his liability upon the open account. Henry Nietert was made a co-respondent with Trentman to answer as to the matters charged as above.

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Trentman demurred separately to the complaint, and, his demurrer being sustained, final judgment was rendered against the appellant upon demurrer.

The case of *Nichols v. Nichols*, 96 Ind. 433, is relied upon by counsel for Trentman as fully sustaining the decision of the circuit court appealed from in this case; also as practically overruling the case of *Hite v. Fisher*, 76 Ind. 231, and as very much limiting as a precedent the case of *Smith v. Noe*, 30 Ind. 117.

The case thus relied on does seemingly place a less liberal construction upon the statute authorizing relief from judgments in certain cases than the two preceding cases referred to, but we can not accord to that case so broad an application as is claimed for it on Trentman's behalf. It does reassert in very strong and comprehensive terms the doctrine that, as a general rule, where a sheriff is, in any particular respect, authorized to make a return of his proceedings, the matters returned by him can not, as between the parties to the action, be controverted by extrinsic evidence, but is conclusive upon them, except in an action against the sheriff for a false return, but so far as that case may be construed as holding that a party, upon whom a summons has been returned as served, may not, under some circumstances, be permitted to show that the summons was not in fact served upon him as an excuse for not appearing in the action in time to save a default, the holding in that respect ought, we think, to be limited to the facts of that particular case, and not treated as one of general application. As a rule of general application, we are inclined rather to follow the conclusion reached in the case of *Hite v. Fisher*, *supra*, as to what may be shown as an excuse for not promptly appearing in obedience to a summons. That case impresses us as being more in accord with the spirit of the statute under which this proceeding was instituted, than the case of *Nichols v. Nichols*, *supra*, would be, with the construction placed upon it which counsel for Trentman seek to have given to it.

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It must be borne in mind that the section of the statute in question is the last expression of the legislative will on the subject of the non-conclusiveness of defaults and judgments in certain cases. We assume, therefore, that this older rule as to the conclusiveness of sheriffs' returns ought to be enforced in the light of that section of the statute. If a default may be taken against a defendant who has not been really served with a summons, upon a false return of the sheriff, and if such want of actual service of the summons can not be urged as a reason for setting aside the default, then injuries may be inflicted upon defendants in many cases for which an action against the sheriff would afford no adequate remedy.

The object of this proceeding is neither to set aside the service of the summons, nor to question the jurisdiction which the circuit court acquired over the appellant in virtue of the sheriff's return, but is simply and only to have a default taken against the appellant during the progress of the cause set aside upon the ground that up to that time he had no actual knowledge of the pendency of the action against him, and that hence his neglect in not appearing in time to make his defence was excusable. The facts averred constitute what appears to us to be a well sustained case of excusable neglect on the part of the appellant. As a practical question, we know of no better excuse for the non-appearance of a party at the proper time than that he had never in any way received actual notice of the pendency of the suit. *Bertline v. Bauer*, 25 Wis. 486; 3 Wait Pr. 665. See, also, the case of *Zerger v. Flattery*, 83 Ind. 399.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed April 11, 1885.

DISSENTING OPINION.

ELLIOTT, J.—I am compelled to dissent from the conclusion reached in the prevailing opinion. There is but one point decided and that is this: A defendant may, for the pur-

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pose of setting up a defence, contradict a sheriff's return to the summons. The question is not whether a defendant may show some excuse for not obeying a summons or may be relieved on the ground of fraud, but whether he may directly contradict the sheriff's return. The complaint does not admit service and offer an excuse for a failure to appear; on the contrary, it broadly denies service. The pleading tenders only one issue, service or no service. The only question before us, therefore, is, whether a defendant can contradict the sheriff's return?

It seems to me that it is not consistent with principle to permit the official return of a sworn officer to be contradicted, and that it is a departure from principle that will result in serious evil. There ought to be more respect given to a disinterested officer's official act than to the statement of an interested party, and yet the view of the majority places both on substantially the same footing. Great harm, as it seems to me, will result from the ruling here announced, for it destroys the force which should attach to official acts, makes judicial proceedings uncertain and titles precarious. A sheriff can not always remember the parties served, and if we depart from his official return all is left to human memory, which at best is treacherous and uncertain.

Two cases are relied on by the majority, and these are *Hite v. Fisher*, 76 Ind. 231, and *Smith v. Noe*, 30 Ind. 117. It is with great deference that I submit that the first of the cases cited does not support the conclusion reached by the majority opinion: The default in that case was set aside as to one only of the defendants, and the affidavit of that defendant, William N. Hite, shows an excuse for not responding to the summons. It is the existence or non-existence of an excuse for not responding to the summons that marks the difference between the two classes of cases. It was not necessary to decide in *Hite v. Fisher*, *supra*, that the return of the sheriff can be contradicted by a party, nor, as I understand the opinion, was it decided. All that was decided is, that the de-

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defendant showed an excuse for not appearing in obedience to the writ. That I am correct in this is apparent from the decision in *Krug v. Davis*, 85 Ind. 309, where the opinion was written by the same judge who wrote the opinion in *Hite v. Fisher*, *supra*, and where it was said: "It necessarily follows that besides, or instead of, denying the fact of service, the complaint should have alleged that there was not in fact, and the record of the judgment did not show, a return of service of summons upon the judgment defendant." *Smith v. Noe*, *supra*, does, perhaps, sustain the views of the majority, although the real ground of that decision is that the defendant was not a resident of the State.

The cases asserting that the return of the sheriff to a summons or other writ is conclusive are very numerous, and in all of them it is decided that the return can not be contradicted, although an excuse for not appearing may be shown. In the latest decision upon this subject, the question was presented as it is here, was directly in the case, was discussed, was decided, and there is no possible way of reconciling the decision in that case with the conclusion which the majority announce in this case. *Nichols v. Nichols*, 96 Ind. 433. The decision in the case cited is supported by a long line of cases and has been for years the settled rule in this State. *McConnell v. Hannah*, 96 Ind. 102, *vide* p. 103; *Hessong v. Pressley*, 86 Ind. 555, *vide* p. 559; *Krug v. Davis*, 85 Ind. 309; *Cavanaugh v. Smith*, 84 Ind. 380, *vide* p. 381; *Clark v. Shaw*, 79 Ind. 164; *Hume v. Conduitt*, 76 Ind. 598, *vide* p. 600; *State v. Davis*, 73 Ind. 359; *Fry v. Gallaspie*, 61 Ind. 478; *Johnson v. Patterson*, 59 Ind. 237, *vide* p. 240; *Meredith v. Chancey*, 59 Ind. 466, *vide* p. 469; *Stockton v. Stockton*, 59 Ind. 574, *vide* p. 578; *Splahn v. Gillespie*, 48 Ind. 397; *Rowell v. Klein*, 44 Ind. 290 (15 Am. R. 235); *Williams v. Case*, 14 Ind. 253; *Harlan v. Harris*, 17 Ind. 328; *Lines v. State, ex rel.*, 6 Blackf. 464; *Goodtill v. Cummins*, 8 Blackf. 179; *Hamilton v. Matlock*, 5 Blackf. 421. For cases in other courts see *Murfree Sheriffs*, section 668, *auth. n.*

The argument that the sheriff's return is conclusive for the purpose of giving jurisdiction, but not for the purpose of conferring authority to conclude the defendant from making a defence is, I respectfully affirm, radically unsound. If the court acquires jurisdiction, then it has authority to pronounce judgment, and if it has authority to pronounce judgment, its judgment is valid and conclusive. It seems to me logically impossible to separate the jurisdiction from the authority to pronounce a valid judgment. If there is jurisdiction of the subject-matter and of the persons, the judgment is valid and effective.

If a defendant is not served with process, then there is no jurisdiction, and without jurisdiction there can be no valid judgment. If, therefore, there was no service there was no jurisdiction, and the defendant, in asserting that there was no service of process, does not simply assert that there was an erroneous proceeding, but that there was, in legal contemplation, no judgment at all. There is, therefore, no middle ground. Either there was jurisdiction, or there was not jurisdiction; if there was jurisdiction, the judgment is valid; if there was not, the judgment is a mere nullity. The only logical course, as it seems to me, is to hold that by contradicting the sheriff's return the defendant may show that there was no jurisdiction, or that there was jurisdiction, and, therefore, a valid judgment. As our cases have so long and so uniformly held that a defendant can not contradict the return, there is, as I view the question, only one course, and that is to hold that the return can not be contradicted, and consequently that there is jurisdiction and a valid judgment.

If it be granted that the return is conclusive, then it is legally impossible that a contradiction of the return can constitute an excuse. If the return is conclusive, no showing against it can be made for any purpose; if it is not conclusive, then a showing may be made against it for any legitimate purpose, so that, in order to hold that an excuse is made out by

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showing that there was no service, it must also be held that the return is not conclusive.

It is difficult to perceive on what ground a defendant can be allowed to plead as an excuse a contradiction of a sheriff's return, when that return is conclusive. An excuse can not be made out by showing what the law prohibits a party from showing.

The statute authorizing the setting aside of defaults upon proper excuse shown can not, in my opinion, be construed to mean that a defendant may show as an excuse a fact which the law concludes him from averring. The excuse meant by the statute is such, and such only, as there is no established rule of law prohibiting a party from making. A party can not have a legal excuse where there is a rule of law declaring that he may not set up the facts which he assumes constitute the excuse. The statute ought, I readily agree, to be liberally construed, but it ought not, as I think, to be so construed as to allow a defendant to construct an excuse out of facts which a long settled rule of law forbids him from averring. If a defendant, in addition to showing no service, should show facts indicative of fraud, then a case would be made out justifying judicial interference. This he might readily do by averring that the plaintiff knowingly took a judgment he was not entitled to, or by averring other facts establishing fraud. There are, indeed, many things that would justify an opening of the judgment, so that the defendant is not remediless.

Other reasons might be urged in support of the views here hastily and imperfectly outlined, but the time at my command will not permit a more extended discussion.

Howk, J., concurs in this opinion.

Filed April 11, 1885.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—The numerous cases cited by appellees' learned counsel, and in the dissenting opinion, assert the general rule, that a sheriff's return to a summons can not be

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contradicted by the parties, in order to overthrow the service and defeat the jurisdiction of the court over the person of the defendant; and that such officer's return to such summons, or to any other writ, to which it is his duty by law to make a return, can not be controverted by the parties in a collateral proceeding. In none of them was the question presented as in this case, except in the case of *Nichols v. Nichols*, 96 Ind. 433, which was noticed in the principal opinion.

The case of *Angell v. Bowler*, 3 R. I. 77, cited by appellees' counsel, is where a party appeared for the sole purpose of dismissing the action, by disputing the sheriff's return. That is not this case. The case of *Stoors v. Kelsey*, 2 Paige, 418, was a collateral attack upon a sheriff's return to an execution; and so the case of *Taylor v. Lewis*, 2 J. J. Marshall, 400, was an action to enjoin the collection of a judgment, on the ground that the summons had not been served upon the defendant in the original action. That was a collateral attack, and in the decision of the case the court asserted the general rule, that in such cases the sheriff's return was conclusive as between the parties. This again is not the case before us.

It is a rule everywhere that a party to an action is entitled to have his day in court, and that no one should be convicted or mulcted in damages without a hearing, or an opportunity to be heard. In furtherance of this rule, it was enacted in this State in 1852, if not before, that the court might, in its discretion, at any time within one year, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. This left the relief discretionary with the court. The code of 1881 extends the time to two years, and makes the granting of relief the imperative duty of the court. 2 R. S. 1876, p. 82, section 99; R. S. 1881, section 396; *Smith v. Noe*, 30 Ind. 117.

These statutes show that the Legislature intended that full opportunity should be afforded to all persons to make whatever defence they may have to actions brought against them.

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The rulings of the courts have been that such statutes should be liberally construed, so that their purpose may be carried out.

It is conceded here, that if appellant, in his complaint, had admitted that the summons was served upon him, he might then render an excuse, and a sufficient excuse, for not having appeared to the action, and hence have the default set aside and be allowed to make a defence. The contention is, that because he asserts that no summons at all was served upon him, therefore he can have no relief under the statute. Granting this contention, it would seem to result in this: If a party has been served with summons, and thus afforded, at least, some opportunity to appear and make a defence, and he neglects to do so, he may render an excuse for the neglect, have the judgment opened, and make his defence afterwards. If he has not been served at all, and has thus had no opportunity to know of the action against him, and hence no opportunity to appear and defend, he can render no excuse that will entitle him to relief under the statute. In other words, where he ought to have the lesser excuse, an excuse can be made available, but where he ought to have the greater excuse, he can have no excuse at all.

The construction of the statute contended for would, to a large extent, thwart the purpose of the statute, and should not be given to it unless imperatively demanded by some rule of the law. The rule invoked by appellees is the general rule, that the sheriff's return can not be contradicted, and it is said that the one question presented is, can the sheriff's return be contradicted? Thus broadly stated, that is not the one question presented by appellant's application to be allowed to defend the action. He does not assert that the judgment is invalid; he does not assert that the court acquired no jurisdiction over him because the summons was not served upon him. His complaint is not to have the judgment declared a nullity; on the contrary, he impliedly admits the validity of the judgment and the jurisdiction of the court over

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him, by asking that the judgment be opened and he be allowed to defend. He can not dispute the service for the purpose of assailing the judgment as void, nor of disputing the jurisdiction of the court over him; he can not do this by reason of the rule invoked by appellees. That rule says, that for the purpose of jurisdiction the return of service by the officer is conclusive, although, in fact, there may have been no service.

The officer having made a return of service upon appellee, therefore, for the purpose of acquiring jurisdiction over him, he was in law served with summons. He neglected to appear and was defaulted. The statute says, that if he can show surprise or excusable neglect, that default shall be set aside. For the purpose, and for the sole purpose of showing a sufficient reason for not appearing and making defence, he asserts that the summons was not, in fact, served upon him, and that hence he had no actual notice or knowledge of the action against him; and that having had no such notice or knowledge is his excuse for not appearing and defending the action, and is the excusable neglect on account of which he should now be allowed to defend. This certainly is a reasonable and a sufficient excuse, and one that he ought to be allowed to make, in order that he may have his day in court. Such an excuse no more overthrows or unsettles judgments than the excuse that the party did not, for reasons given, understand the summons, and many like excuses that have been held sufficient under our statute and like statutes of other states. It is not a sufficient answer to say that a party may have his remedy against the sheriff for a false return. The sheriff's bond, in this State, is in the amount of \$5,000. The judgment by default and upon the incorrect and false return may be for \$50,000 or more.

It is difficult to understand how it can be contended that the cases of *Hite v. Fisher*, 76 Ind. 231, *Smith v. Noe*, 30 Ind. 117, and *Zerger v. Flattery*, 83 Ind. 399, are not in point in support of the principal opinion.

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In the case of *Hite v. Fisher, supra*, judgment in garnishment had been taken against William N. Hite, George W. Hite and Darius Patterson by default. The summons as to them was returned as served by reading. They made application under the statute to have the judgment opened and to be allowed to defend. The Hites based their application upon the fact that the summons was not read to nor by them; that the bailiff told them he had a subpoena for them, but read nothing to them. They thus asserted a fact contradictory of the officer's return. Patterson based his application upon the fact that the summons was not served upon him, either by reading or a copy, and that he had not seen the officer at all. He thus stated facts contradictory of the sheriff's return. This asserted want of service, and hence want of notice, was offered as an excuse for the failure of the parties to appear, and as a reason why the judgment should be opened, and they be allowed to defend. The question was made that their application should be rejected, because they were attempting to contradict the officer's return in order to furnish an excuse for not having appeared. In answer to this contention it was said: "It (the return) is conclusive between the parties as respects the fact of service, and the jurisdiction based thereon. But the application of the appellants is not to set aside the service, and does not involve the jurisdiction of the court over their persons in the case. The whole scope and significance of their motion is to show that while, in contemplation of law, they had been served with summons, they had no actual knowledge of the institution of the suit or procedure against them, and therefore, under the circumstances, are excusable for neglecting to appear and make the defence which they claim. For this purpose, upon every principle of good conscience and right, and without violence to any rule of law or practice, it was competent for the appellants to make the showing which they did present; and, upon that showing, we think it clear that,

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within the meaning of the statute, the judgment was taken against them through their surprise and excusable neglect."

What was said by the same learned judge in the case of *Krug v. Davis*, 85 Ind. 309, is not at all in conflict with the above, because that was a case of collateral attack, and not a case to set aside a default under the statute.

In the case of *Smith v. Noe*, *supra*, the defendant, although a non-resident of the State, was served with summons in this State. Such *bona fide* service upon a non-resident gives the courts of this State jurisdiction of the person, the same as if he were a resident of the State. The case, therefore, did not turn upon the fact that the defendant was a non-resident of the State except so far as that fact had a bearing upon his neglect to appear to the action. The summons was in fact served upon him on Sunday. The sheriff's return showed that it was served on Monday. A service on Sunday is void, and if the sheriff's return had shown the service to have been on Sunday, the court would have rejected it, and the defendant would not have been defaulted. Upon the application to have the default set aside for the purpose of a defence, the defendant was allowed to contradict the return, and show that the summons was in fact served on Sunday, not for the purpose of defeating the jurisdiction of the court over him, but for the purpose of showing that he had an excuse for not appearing, in that he had a right to expect that the sheriff would make a true return, and as such a true return would have defeated the summons, the defendant's reliance upon such a return being made, furnished some excuse for his not appearing.

The case of *Zerger v. Flattery*, *supra*, is in full accord with the two cases above examined. They are there both cited and approved. In that case, again, the defendant was allowed to contradict the sheriff's return, not for the purpose of defeating the jurisdiction of the court over him, but for the purpose of rendering an excuse for not appearing to the action, and hence as furnishing a reason why the default should be set aside and he be allowed to defend.

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We are not without authority elsewhere in support of the principal opinion. The case of *Mosseaux v. Brigham*, 19 Vt. 457, was decided under sections of the law of that State found in the revised statutes of that period. That revision is absent from our library, but we find in the revised statutes of that State, 1863, pp. 282, 334, sections 39, 7, what are evidently the same as the sections referred to in the opinion in the above case. These statutes provided that justices of the peace might set aside a default at any time within two hours after the rendition of the judgment. They also provided that when a judgment should be rendered by a justice of the peace upon a default, and the defendant should be unjustly deprived of his day in court by fraud, accident or mistake, or should be prevented from entering an appeal from the judgment of a justice of the peace by fraud, accident or mistake, the county court might, on the petition of the person aggrieved, in its discretion, and on terms, reverse and set aside the judgment of such justice, and proceed to hear, try and determine the action, etc.

In the above case, the party against whom judgment had been rendered by the justice upon default petitioned the county court to set aside that judgment, and to be allowed a trial in the case. He alleged in his petition that he had no notice of the suit until after the rendition of the judgment. It appeared from the record of the justice of the peace in the original suit, that notice to the petitioner of the pendency of that suit was proved prior to the rendition of the judgment against him by default. In support of his application, the petitioner was allowed to prove that he, in fact, had no notice, the justice's record to the contrary notwithstanding. It was contended in the Supreme Court, that the admission of that evidence was erroneous, upon the ground that the service shown by the justice's record could not be thus contradicted. The court held otherwise.

After noticing the fact that the justice's record showed notice to the defendant and suggesting the inquiry as to whether

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that was an obstacle in the way of relief, and after recognizing and restating the general rule, that the record of a court having jurisdiction of the subject-matter imports absolute verity, the court said: "If the revisory power of the county court, over the judgments of a justice, could not be exercised, where it appeared from the record that the defendant had had notice of the suit, by disproving the notice, a large class of the most probable cases of accident and mistake, if not of fraud, would be excluded from its consideration. The fact of notice usually appears in the officer's return on the writ; and that return, becoming a part of the record, is of equal verity, between the parties to the suit, with a record of the proof of notice. If the officer, in his copy left with the defendant, by mistake inserts a more distant day for the holding of the court, than that in the writ, or by mistake delivers his copy to a person other than the defendant, by reason of which a default is taken, shall the party, in such case, be allowed to enjoy the fruits of an unjust judgment, and the defendant be turned over to an uncertain remedy against an innocent officer? Or may not the county court, on such terms as shall preserve the rights of the plaintiff, set aside the default, and allow the injured party a trial? Such a case presents quite as strong a case for relief, as a case where the defendant, having notice, is prevented by some accident from reaching the place of trial at the appointed time. In the latter case additional precautions in the defendant might, perhaps, have guarded him against the injury; but in the former no diligence of the party could prevent it. Both classes of cases seem to have been designed to be provided for by the statute; and, as the county court is clothed with the power of granting the relief on such terms as will preserve the rights both of the plaintiff and defendant, the furtherance of justice, as well as the language and intention of the Legislature, appear to require, that the statute should receive the extended construction we have given it." The reason-

ing in that case is applicable to our statute and the case before us.

There was a provision in the California code like that in ours, that the court might relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. Code of California, published in 1872, section 473 (68).

The case of *McKinley v. Tuttle*, 34 Cal. 235, was an application, under the above section of the code, to set aside a judgment on the ground that the petitioners had no notice or knowledge of the judgment until after the expiration of the term. This was resisted upon the ground that the record showed that they appeared and defended by attorneys. In noticing the contention, that the petitioners could not contradict the record, by showing that they had no notice or knowledge of the judgment, the court said: "Such would doubtless be the result if the question had arisen collaterally, but not so in a direct proceeding in the same action to set aside the judgment under section 68. In such a case the parties are not concluded by the record in any respect; on the contrary they are allowed to show the true facts by any competent evidence."

Section 366 of the New York code provides that if the defendant failed to appear before the justice, and it is shown by affidavit that manifest injustice has been done, and he satisfactorily excuses his default, the county court on appeal may, in its discretion, set aside or suspend the judgment, and order a new trial before the justice, etc. Voorhies' New York Annotated Code.

The case of *Carroll v. Goslin*, 2 E. D. Smith (N. Y.) 376, arose under this section of the code. The petitioner sought to have relief from a judgment by default before a justice, on the ground that the process, if served at all, had not been served in a manner to apprise him of the action. The court, in passing upon the application, stated the general rule, that the return of the constable gives the court jurisdiction, and

can not be impeached collaterally, and then said: "No such question, however, arises here. This is an application to open the judgment, and not a collateral proceeding, and the court will inquire into any facts and circumstances which go to excuse the defendant's default; and if it appear that he was misled, or not sufficiently advised of what was required of him by the summons, from the improper or defective manner in which it was served, the court would hold the default sufficiently excused."

Proof was received to show that all the officer did was to hold up a piece of paper and say, "Here is a paper for you in the Marine Court," and then went away. That evidence, so far, was allowed to contradict the officer's return, for the purpose of showing that the defendant had an excuse for not appearing to the action. The principal opinion is fully supported by the opinion of SHAW, C. J., in the case of *Brewer v. Holmes*, 1 Met. (Mass.) 288. See, also, as supporting the above cases, although indirectly, *Hunter v. Lester*, 18 How. Pr. 347.

Mr. Freeman, in his work on Judgments, at section 109, in speaking of the statutes authorizing relief from judgments by default, says: "In applications under these statutes the parties are at liberty to contradict the record, and to establish, by any competent evidence, the truth of the facts upon which their claim to relief is based."

These authorities fully sustain the conclusion reached in the principal opinion, that, under the statute, for the purpose of rendering an excuse for not appearing and defending the action, the defaulted party may show that the summons was not in fact served upon him, and that hence he had no knowledge of the action.

Petition for a rehearing overruled.

HOWK and ELLIOTT, JJ., again dissent.

Filed Jan. 21, 1886.

Wisehart v. The State.

104 477
161 888

No. 12,739.

WISEHART v. THE STATE.

CRIMINAL LAW.—*Appeal from Justice of Peace.—Dismissal.—Jurisdiction.*—

Upon appeal to the circuit court from a judgment of conviction in a criminal case before a justice of the peace, the circuit court acquires complete jurisdiction of the case, and, without its consent, the defendant can not dismiss his appeal.

From the Hancock Circuit Court.

C. G. Offutt, R. A. Black and W. J. Sparks, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

MITCHELL, J.—Wisehart was charged with a misdemeanor and fined by a justice of the peace. He appealed to the circuit court and entered into recognizance for his appearance on the first day of the ensuing term, to answer the charge preferred against him and abide the judgment of the court. On the first day of the term he appeared and moved the court to dismiss his appeal. This motion was overruled, and upon trial he was again found guilty and fined. He brings the record here on appeal and assigns for error the ruling of the court in overruling his motion to dismiss his appeal.

It is contended on appellant's behalf that he was entitled to dismiss his appeal as a matter of right, without assigning any cause therefor. We think this view of the case can not be maintained.

Section 1643, R. S. 1881, provides for appeals in criminal cases before justices of the peace as follows: "Any prisoner against whom any punishment is adjudged may appeal to the criminal court, and, if there be none, then to the circuit court of the county, within ten days after trial, on entering into recognizance for his appearance at the next term of such court, as in other cases; and such appeal shall stay all proceedings." Section 1644 prescribes the form of recognizance, and sec-

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tion 1645 requires the justice to transmit the recognizance and a transcript of the proceedings, together with all the papers in the case, to the clerk of the proper court. The clerk is required to docket the case for trial. When this is done the cause is then in the court to which the appeal is taken, and is to be disposed of precisely like any other criminal case there pending.

The effect of the appeal is more than a mere stay of the proceedings before the justice. If, as the learned counsel argue, the judgment of conviction before the justice was not vacated by the appeal, the defendant could not be tried a second time while that judgment remained in force. The appeal stays the proceedings before the justice, and it does more, it transfers the whole proceeding to the court to which the appeal is taken, to be disposed of there *de novo*. After the appeal, the case is completely within the jurisdiction of the circuit court, and unless some express authority exists giving the accused the right to dismiss his appeal and authorizing the circuit court to certify the fact back to the justice, that court must dispose of the case as other criminal cases are disposed of. There is no provision in the act regulating criminal procedure before justices of the peace authorizing appeals to be dismissed. Section 1504, R. S. 1881.

Having brought himself voluntarily within the jurisdiction of the circuit court, the appellant could not defeat the jurisdiction of the court to which he appealed without its consent. We think the case is covered in principle by *Wachstetter v. State*, 42 Ind. 166.

Judgment affirmed, with costs.

Filed Jan. 5, 1886.

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No. 12,203.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. FALVEY.

EVIDENCE.—*Motion to Strike Out Testimony.*—*Practice.*—Where a motion to strike out testimony is made, and the adverse party consents that it be sustained, after which the motion is withdrawn, but the court, upon the request of such adverse party, strikes out all the testimony objected to by the motion, the party making the motion can not complain of the action of the court, and the original admission of the testimony is not available error.

SAME.—*Expert Witness.*—*Hypothetical Question.*—A party, seeking an opinion from an expert witness, may assume in his hypothetical question such facts as he deems proved by the evidence, and it is for the jury to determine whether the facts are correctly assumed.

SAME.—It is only where there is no evidence at all in support of the facts assumed, or where the question is clearly irrelevant, or where it is merely speculative or improperly framed, that the court can interfere to prevent the propounding of a hypothetical question.

SAME.—It is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses. The opinion of an expert witness must be based on facts, and not opinions.

SAME.—*Permanency of Injury.*—It is competent to prove by expert witnesses the probability that the injury complained of will permanently impair the health and physical and mental ability of the plaintiff.

SAME.—Where some of the facts assumed in a hypothetical question have been eliminated by a subsequent ruling of the court, but there still remain in evidence facts upon which an opinion may be properly based, it is not error to refuse to strike out the entire opinion, though such elimination may weaken the value of the opinion.

SAME.—*Railroad.*—*Negligence.*—In an action against a railroad company for personal injuries alleged to have been caused by the negligent conduct of the defendant's servants, an expert medical witness was asked this question over the objection of the defendant: "State to the jury what fact you observed, what, if any, experiments you made, and what you learned to be the now condition, or the then condition, of the eyes and ear, and how it was done?" Held to be competent.

SAME.—It is always competent to ask a medical witness what observations he made, and what was the condition of the patient he was called upon to examine, without regard to the purpose of the examination.

SAME.—*Cross-Examination of Expert Witness.*—In cross-examining a medical expert it is proper for the cross-examining counsel to state hypothetical cases, for the purpose of testing the skill and knowledge of the witness.

SAME.—*Practice.*—General objections to testimony, on the ground that the

104	409
124	198
126	532
104	409
128	57
104	409
140	70
141	14
104	409
149	401
150	390
104	409
156	430
104	409
163	496
104	409
165	561
104	409
168	475

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same is incompetent and immaterial, present no available questions entitled to consideration on appeal.

SAME.—Motion to Strike Out Testimony.—Separation of Competent from Incompetent Testimony.—Where there is competent testimony given both in the examination in chief and on cross-examination, a motion made by the party by whom the witness was called to strike out all of such testimony should be overruled. It is the duty of such party to select the competent from the incompetent testimony, and to point out in his motion the specific testimony objected to, as well as to indicate the character of his objections.

SAME.—Objection to Medical Examination, Effect of.—The fact that a plaintiff in an action for personal injuries objected to a medical examination of her person, ordered at the instance of the opposite party, can not affect the merits of the case, and should not be admitted in evidence.

SAME.—Medical Examination of Party.—Declarations of Present Pain.—Declarations, indicative of present pain, made by a party to medical witnesses at the time of treatment or examination, are admissible.

SAME.—Declarations of Party During Course of Medical Examination.—Semble, that where medical experts are ordered by the court to examine a party on the motion of his adversary, what is said by such party during the course of such medical examination, in answer to questions asked by the medical experts, is admissible in evidence.

SAME.—Medical Examination.—Experts.—Cross-Examination.—Practice.—Where medical experts are ordered by the court to examine a plaintiff, in an action for injuries to the person, and such experts are called and questioned by the defendant as to the result of their examination, the plaintiff may ask on cross-examination how the examination was conducted, and what questions were propounded to the plaintiff.

SAME.—Examination in Absence of Adverse Party.—Evidence of an examination of a plaintiff by a medical witness is not rendered incompetent by the fact that the adverse party was not present when it took place; nor, if the examination is properly made, because it was made after the commencement of the action.

SAME.—Proper Basis of Opinion by Expert.—A medical expert, who has obtained knowledge of the facts of the case, and has stated the facts to the jury, may take them into consideration in giving his opinion, as well as facts communicated to him in a hypothetical question, and his opinion may rest in part on statements made by his patient.

SAME.—Directions of Physician.—In an action for personal injuries, it is proper for the plaintiff to prove the directions given her by her physician, and that she had obeyed them.

SAME.—Proof of Plaintiff's Condition.—Where the complaint states the character of the injuries received by plaintiff, and alleges permanent injury, it is proper, under these allegations, to give evidence of the mental and physical condition of the plaintiff.

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SAME.—Opinion of Witness as to Age of Party.—Impeachment.—Where, on his examination in chief, a witness gives an opinion as to the age of the plaintiff, and on cross-examination is asked for and gives an opinion as to the age of a bystander, it is competent for the plaintiff to call such bystander and prove his age, for the purpose of showing the incapacity of the witness to correctly judge of a person's age.

INSTRUCTION TO JURY.—Inferences of Fact.—It is not proper for the court to instruct the jury what inferences of fact they shall draw from the evidence, nor to instruct in detail upon the effect of facts put in evidence.

NEGLIGENCE.—Action for Personal Injury.—Degree of Care Required of Plaintiff in Securing Medical Aid.—Damages.—One who is injured by the negligence of another is bound to use ordinary care and diligence in securing medical or surgical aid, and in case of a failure so to do, this should be taken into account in estimating damages, and no damages should be allowed for ailments or diseases that have resulted from the failure to use such care and diligence.

SAME.—Instruction.—Damages.—In an action by one who is injured by the negligence of another, an instruction that "It was the duty of the plaintiff to use ordinary care to cure and restore herself, and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in inclement weather, or otherwise, after receiving her injuries, if any she received in such accident, and thereby increased and aggravated such injuries, and enhanced their evil effects, you will take these facts into account in arriving at your verdict—if you find for the plaintiff—and should not allow any damages to plaintiff for any ailments, injuries or diseases, or their aggravation, from which plaintiff has been or may be suffering by reason of such exposure, and from which she would not otherwise be suffering," correctly states the law.

SAME.—Predisposition to Disease.—Instruction.—In an action for personal injuries, alleged to have been received by the negligence of others, an instruction, in effect, that, "If you find that the plaintiff received the injuries complained of, or any of them, in the manner alleged, and at that time she was predisposed to malarial, scrofulous or rheumatic tendencies, but otherwise in good health, and that said injuries, or any of them solely, excited or developed said predisposition to malarial, scrofulous or rheumatic tendencies, so that thereby, without the fault of plaintiff, her present condition, whatever you may find that to be, has directly resulted, then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be," correctly states the law.

SAME.—Measure of Damages.—In such action, the jury, in estimating the amount of damages to which plaintiff is entitled, may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of the injuries, and physical and mental suffering caused by

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and arising out of such injuries. They may also consider the professional occupation of the plaintiff, and her ability to earn money. The plaintiff will be entitled to recover for any permanent reduction of her power to earn money by reason of such injuries, and the amount assessed should be such a sum as will in the judgment of the jury fully compensate the plaintiff for such injuries, or any of them so sustained.

From the Tippecanoe Circuit Court.

G. W. Easley, G. W. Friedley, W. F. Stillwell, S. O. Bayless and W. H. Russell, for appellant.

B. W. Langdon, T. F. Gaylord and J. F. McHugh, for appellee.

ELLIOTT, J.—The appellee's complaint alleges that she was received as a passenger on one of the appellant's trains and was injured in a collision caused by the negligence of the appellant's servants.

The first question in logical order arises upon the rulings made on the admission of the testimony of Dr. R. M. O'Ferrall. We are satisfied that the appellant is not in a situation to successfully complain of these rulings, for it obtained all it properly asked upon this subject. This we say for the reason that the appellee consented that the appellant's motion to strike out the testimony might be sustained; to this the former objected and withdrew its motion, but, notwithstanding the withdrawal of the motion, the court, upon the request of the appellee, did strike out all of the testimony objected to by the appellant. As the latter received all it asked, it has no just grounds of complaint.

A party seeking an opinion from an expert witness may assume in his hypothetical question such facts as he deems proved by the evidence. A recent author says, of such questions: "If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist." Rogers Expert Testimony, 39. Another author thus states the rule: "It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any

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state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." Lawson Expert and Opinion Ev. 153. In the recent case of *Quinn v. Higgins*, 63 Wis. 664, the Supreme Court of Wisconsin said: "The rule in that respect must be that, in propounding a hypothetical question to the expert, the party may assume as proved all facts which the evidence in the case tends to prove, and the court ought not to reject the question on the ground that, in his opinion, such facts are not established by the preponderance of the evidence. What facts are proved in the case, when there is evidence to prove them, is a question for the jury and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established." This court has often declared the rule in substantially the same language as that employed by the authors from whom we have quoted. *Davis v. State*, 35 Ind. 496 (9 Am. R. 760); *Bishop v. Spinning*, 38 Ind. 143; *Guetig v. State*, 66 Ind. 94 (32 Am. R. 99); *Nave v. Tucker*, 70 Ind. 15; *Elliott v. Russell*, 92 Ind. 526; *Goodwin v. State*, 96 Ind. 550, *vide* authorities cited, pp. 555, 574.

The appellee's counsel had a right to assume such facts as they deemed proved, and it was for the jury, as we have many times decided, to determine whether the facts were or were not justly assumed. *Goodwin v. State*, *supra*, *vide* authorities cited p. 561; *Elliott v. Russell*, *supra*; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Fulwider v. Ingels*, 87 Ind. 414; *Guetig v. State*, *supra*.

Some of the facts assumed in the hypothetical questions propounded to Dr. O'Ferrall were eliminated by the subsequent ruling of the court upon the appellee's motion to strike out part of his testimony, but enough facts remained to entitle his opinion to go to the jury under the rule declared in the

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authorities to which we have referred. Where there are facts upon which an opinion may be properly based, it is not error to refuse to strike out the entire opinion, for such an opinion should go to the jury for what it is worth, although the elimination of some of the facts may weaken the value of the opinion. But if we are wrong in this view, still no harm resulted, for the same facts testified to by Dr. O'Ferrall were substantially proved by other witnesses. Whatever view is taken of the ruling on Dr. O'Ferrall's testimony, no substantial harm was done the appellant. Strength is added to this view by the further fact that the court in its instructions, in very clear and forcible terms, directed the jury to disregard that part of the testimony to which the appellant's motion to strike out was addressed.

The question asked Dr. Hallihan was not answered, but other questions were substituted, and it is quite clear that no harm resulted from the bare asking of the question, even though it was an improper one.

Dr. Burke was asked: "State to the jury what fact you observed, what, if any, experiments you made, and what you learned to be the now condition, or the then condition, of the eyes and ear, and how it was done." We can perceive no objection to this question, for it surely is always competent to ask a medical witness what observations he made and what was the condition of the patient he was called upon to examine. It makes no difference, so far as concerns the competency of the testimony, what the purpose of the examination was, although that fact might, perhaps, exert some influence upon the credibility of the witness. If the physician did in fact make an examination, his observations of the condition of the person examined by him are unquestionably competent.

We have again and again decided that objections to testimony must be specifically stated to the trial court, and that only such objections as were stated to that court can be considered on appeal. In the bill of exceptions the objection

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to a part of Dr. Webster's testimony is thus stated: "To which question the defendant objected because he has not said that he based his opinion on what the plaintiff told him, and also as being irrelevant, incompetent and immaterial, and not cross-examination, which objection the court overruled, to which ruling of the court the defendant at the time excepted."

These are the only grounds of objection which we can consider, and we find no merit in them. It was the right of the counsel of appellee, in cross-examining Dr. Webster, to test his knowledge and skill as a medical expert, and also to ascertain the grounds upon which he based his opinion. This right was not abridged by the answer of the witness that he did not take into account the statements of the appellee, since, to hold otherwise, would enable a medical witness to shut off all investigation as to his methods of examination by a general statement that he did, or did not, take certain matters into consideration, and to allow this would be to destroy one of the great purposes of a cross-examination. We can not doubt that a cross-examining counsel has a right to know how a medical investigation was conducted, and what method was pursued. He has a right to know this for the purpose of ascertaining whether the examination was a thorough one, and also for the purpose of discovering whether skill and care were used.

So far as the statement of the objection urges that the testimony was incompetent and immaterial, it is not entitled to consideration on appeal, for the reason that it is not sufficiently specific. General objections of this character present no available questions. *Over v. Schiffing*, 102 Ind. 191; *Shafer v. Ferguson*, 103 Ind. 90; *Bottenberg v. Nixon*, 97 Ind. 106; *Jones v. Angell*, 95 Ind. 376; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Harvey v. Huston*, 94 Ind. 527; *McClellan v. Bond*, 92 Ind. 424; *Stanley v. Sutherland*, 54 Ind. 339.

In cross-examining a medical expert, it is proper for the cross-examining counsel to state hypothetical cases for the

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purpose of testing the skill and knowledge of the witness. *Davis v. State*, *supra*, see p. 498; Rogers Expert Testimony, 50. It was, therefore, proper for the appellee, in cross-examining Dr. Webster, to state a hypothetical case and ask his opinion upon it.

Where there is competent testimony given both in the examination in chief and on cross-examination, a motion made by the party by whom the witness was called to strike out all of such testimony should be overruled. *Wolfe v. Pugh*, 101 Ind. 293; *Elliott v. Russell*, *supra*. It is the duty of the party to select the competent from the incompetent testimony, and he will not be allowed to impose that burden on the trial court. *Cuthrell v. Cuthrell*, 101 Ind. 375. This is not a mere arbitrary technical rule, but is one founded on solid principle and essential to the fair administration of justice. It is in harmony with the well settled rule of practice, everywhere obtaining, that the motion of a party must point out the specific testimony objected to; and indicate the character of the objections; and it is also in harmony with the familiar rule, that if a demurrer is addressed to an entire pleading it must be overruled, although the pleading may be bad in part.

We have no doubt that much of the testimony objected to was competent. We regard it as firmly settled that declarations indicative of present pain are admissible. No authority maintaining a different doctrine is referred to, and we know of none. Much of the testimony which appellant sought to have rejected was as to statements made to medical witnesses indicative of present pain, and this testimony was clearly competent.

The doubt in our minds is as to whether any part of the testimony objected to was incompetent. Where, as here, medical experts are ordered by the court to examine the plaintiff, and this is done upon the motion of the defendant, it would seem that what was said by the plaintiff during the course of the medical examination, in answer to questions asked by the medical experts, should go in evidence. They are decla-

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rations accompanying an act, and the general rule undeniably is, that where the act is admissible, so, also, are the declarations accompanying it. But we need not, and we do not, decide this question.

Where medical experts are ordered to examine a plaintiff, and they are called and questioned by the defendant as to the result of their examination, the plaintiff has a right to ask, on cross-examination, how the examination was conducted, and this necessarily includes the right to ask what questions were propounded to the plaintiff. If it were otherwise, the plaintiff could not get fully before the jury the method of investigation pursued by the medical experts, and to deny this would be an unjustifiable restriction of the important right of cross-examination. Another reason supports our conclusion, and that is this: Where a party gives evidence of a part of a transaction, his adversary has a right to full details of the whole transaction.

Evidence of an examination of a plaintiff made by a medical witness is not rendered incompetent by the fact that the adverse party was not present at the time it took place. A plaintiff who submits to an examination by a physician can not be deprived of the testimony of the physician upon the ground that it was made at a time when the defendant was not present.

If the examination of a medical expert is properly made, it is not to be kept out of the evidence because it was made after the commencement of the action. Doubtless, the circumstances under which a medical examination was made may affect, either beneficially or injuriously, the credibility of the witness, but the mere fact that it was made after the action was instituted can not destroy its competency.

We have carefully read Dr. Burke's testimony, and we can not find that he gave in evidence any statement made to him by the appellee as to past symptoms and pain. In one place he says that, "I, having convinced myself then that there

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was an incipient paralysis of the muscles of the eye, and having questioned the lady whether she could see double sometimes, and she answering me that it was a great tribulation"—but here he was interrupted by appellant's counsel, and, on resuming, he stated the result of his own observations without rehearsing any statements made by the appellee. We can not perceive the shadow of a reason for affirming that there was here any statement of past symptoms; on the contrary, it clearly appears that the symptoms referred to were present at the time the examination was made. It is not necessary for us to decide whether statements of past symptoms are or are not admissible, although it is proper to say that there are very many well considered cases declaring that they are admissible, for we are clearly of the opinion that the testimony was descriptive of present and not of past symptoms.

We have already said that it is proper to assume facts in a hypothetical question, and we now add that it is always proper to incorporate in a question to a medical expert the result of knowledge obtained by an examination made by him. A medical expert who has obtained knowledge of the facts of the case, and has stated the facts to the jury, may take them into consideration in giving his opinion. It seems quite clear to us that knowledge obtained from actual observation is as important and weighty as knowledge communicated in an assumption made in a hypothetical question. The physician who examines and treats a case is in a situation to know as much, if not more, of the real condition of his patient than those who have not seen the patient at all, or have seen him but once. We can conceive of no reason that would require a physician in stating his opinion to the jury to exclude the result of his actual observation and knowledge. In *Burns v. Barenfield*, 84 Ind. 43, it was said, in speaking of the testimony of a physician, that "He must base his opinion upon his own testimony, or upon a statement of the facts assumed to have been proven." One of the rules stated by Mr. Lawson is this: "The opinion of a

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medical expert may be based either on his acquaintance with the party whose condition is under investigation or upon a medical examination of him which he has made, or upon a hypothetical case stated to him in court." Lawson Expert and Opinion Ev. 144. A physician can not be permitted to decide upon the credibility of witnesses, nor to take into consideration facts known to him and not communicated to the jury, but, after having communicated such facts in his testimony, he may take them into consideration in forming his opinion. *Koenig v. Globe Mut. L. Ins. Co.*, 10 Hun, 558; *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169; *Van Zandt v. Mutual Benefit Life Ins. Co.*, 55 N. Y. 169 (14 Am. R. 215); *Bush v. Jackson*, 24 Ala. 273; *Bennett v. Fail*, 26 Ala. 605.

The opinion of a medical witness may rest in part on statements made by his patient. Upon this subject the authorities are in harmony, although there is some difference of opinion as to whether statements of past symptoms may be taken into consideration. *Barber v. Merriam*, 11 Allen, 322; *Thompson v. Trevanion*, Skinner, 402; *Aveson v. Kinnaird*, 6 East, 188; *Bacon v. Charlton*, 7 Cush. 581; *Denton v. State*, 1 Swan (31 Tenn.) 278; *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 438; *State v. Gedicke*, 43 N. J. L. 86; *Eckles v. Bates*, 26 Ala. 655; *Quaife v. Chicago, etc., R. W. Co.*, 48 Wis. 513 (33 Am. R. 821); *Brown v. New York Cent. R. R.*, 32 N. Y. 597; *Towle v. Blake*, 48 N. H. 92; *Carthage T. P. Co. v. Andrews*, 102 Ind. 138; *Town of Elkhart v. Ritter*, 66 Ind. 136.

Counsel for appellant assert that hypothetical questions asked by the appellee required the medical expert to decide upon disputed facts, but we find, on an examination of the record, that counsel are in error in assuming that the questions do call upon the witnesses to decide upon disputed matters of fact. If the assumption of counsel were correct, we should not hesitate to adopt their conclusion, but it is not a just one, for the facts are assumed to exist in each and all of the questions. The learned and able judge who tried the case,

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in ruling upon one of these questions, justly remarked: "If the opinion is elicited on a false state of facts, it has no weight; if the facts put to him are proved, it is otherwise." This is the law. If the facts upon which the opinion is based are not proved, the opinion is valueless, or if there is a failure to prove some of the material facts, the opinion is to that extent weakened and impaired. *Goodwin v. State, supra*, and authorities cited. Whether the facts are all proved, or to what extent proved, is a question, not for the court, but for the jury, unless, indeed, the case is one in which there is no evidence at all tending to prove the existence of the facts assumed.

We have no doubt that mere fanciful questions, where there is no evidence at all in support of the facts assumed, or questions assuming facts wholly irrelevant to the subject of the investigation, should be excluded. *People v. Augsburg*, 97 N. Y. 501; *Fairchild v. Bascomb*, 35 Vt. 398; *Williams v. Brown*, 28 Ohio St. 547. But, where there is evidence either directly proving the facts assumed, or evidence from which such facts may be inferred, the court can not invade the province of the jury and decide upon the facts. It is only where there is no evidence at all in support of the facts assumed, or where the question is clearly irrelevant, or where it is merely speculative, or where it is improperly framed, that the court can interfere.

Counsel refer us, among other cases, to the case of *Hitchcock v. Burgett*, 38 Mich. 501. That case decides, as we have here and elsewhere decided, that a medical expert must not be called upon to decide disputed questions of fact. *Craig v. Noblesville, etc., G. R. Co.*, 98 Ind. 109; *Burns v. Barenfield*, 84 Ind. 43. We do not doubt the correctness of this rule, but it can not apply where, as here, the facts are assumed, and the opinion is asked upon the facts which, the witness is informed, are to be regarded by him as actually existing.

We have already said that the medical witness must state to the jury all the facts within his own knowledge which he

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takes into consideration in forming his opinion. Upon this point *Hitchcock v. Burgett*, *supra*, goes no further than we have done. But the appellant can get no comfort from this rule, for the physicians did state the facts upon which they based their opinions.

In cross-examining a medical expert counsel have a right to assume the facts as they believe them to exist, and to ask the expert's opinion upon the facts thus assumed. An examination in chief can not be so conducted as to compel the cross-examining counsel to merely follow the line of questions there asked; but, when a general subject is opened by an examination in chief, the cross-examining counsel may go fully into details, and may put the case before the expert witness in various phases. Each side has a right to take the opinion of the witness upon its theory of the facts established by the evidence. While it is true that a cross-examination must be confined to the subject of the examination in chief, it is not true that the cross-examining party is confined to any particular part of the subject. He has a right in such a case as this to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved, and he also has the right to add to the question such facts as he thinks the evidence establishes. *Davis v. State*, *supra*; *Rogers Expert Testimony*, 46.

A very long and much involved hypothetical question was put to Dr. Webster by the appellant, but, upon the appellee's objection, the court refused to permit it to be answered. To this question there is at least one valid objection. This objection is, that it assumes, as one of the facts, the opinion of another physician that Miss Falvey, the appellee, was not suffering from a lesion of the spine. It is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses. An opinion of an expert witness can not be based upon opinions expressed by other experts. Facts, and not opinions, must be assumed in the questions. If it were otherwise, opinions might be built upon

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opinions of experts, and the substantial facts driven out of the case. An opinion can not rest, in whole or in part, upon other opinions, but must rest upon fact.

It is competent to prove by medical experts the probability that the injury will permanently impair the health and physical or mental ability of the plaintiff. In cases of this class there can be one action only, and in the one action all damages, past and prospective, must be recovered. *City of Elkhart v. Ritter*, 66 Ind. 136; *City of North Vernon v. Voegler*, 103 Ind. 314. In order to assist the jury in arriving at a conclusion as to the character of the injury and the probability of its permanently affecting the plaintiff, it is proper to take the opinion of medical experts upon that subject. *Tinney v. New Jersey Steamboat Co.*, 12 Abbott's Pr. N. S. 1; *Filer v. New York Central R. R. Co.*, 49 N. Y. 42; *Wilt v. Vickers*, 8 Watts, 227; *Kent v. Town of Lincoln*, 32 Vt. 591; *Johnson v. Central Vermont R. R. Co.*, 56 Vt. 707; *Hoard v. Peck*, 56 Barb. 202; *Montgomery v. Town of Scott*, 34 Wis. 538; *Toledo, etc., R. W. Co. v. Baddeley*, 54 Ill. 19 (5 Am. R. 71); *Anthony v. Smith*, 4 Bosw. 503.

The affidavit of Dr. O'Ferrall was excluded on the motion of the appellee, and of this ruling the appellant complains. It is said that this affidavit was competent for the purpose of showing that the appellee objected to a medical examination of her person. We perceive no merit in this position. The appellee unquestionably had a right to make the objection she did, and the jury could have nothing to do with her conduct in opposing an examination. It is a debatable question whether a party can be compelled to submit to a medical examination at the instance of the opposite party, and it can not affect the merits of the case that an objection is made to such an examination.

If the appellant's purpose was to contradict Dr. O'Ferrall, then the proper ground for an impeachment should have been laid. As no foundation for an impeachment was laid, the

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affidavit was not admissible for the purpose of contradicting him.

It was proper for the appellee to prove the directions given her by her physician, and that she had obeyed them. This evidence was competent to rebut the inference that her own imprudence, or her disregard of medical advice, had aggravated her injuries.

The complaint states the character of the injuries received by the plaintiff, and alleges that she was permanently injured, and under these allegations it was proper to give evidence of the mental and physical condition of the plaintiff. In *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471 (17 Am. R. 719), it was said: "The complaint charged that the plaintiff was grievously bruised, hurt, and injured. Under these general allegations, the plaintiff was entitled to prove any and all injuries which he received, and which were the natural consequence of the wrongful act of the appellant." The case quoted from is approved in *Town of Elkhart v. Ritter, supra*, and is sustained by many authorities, among them *Delie v. Chicago, etc., R. W. Co.*, 51 Wis. 400, *Johnson v. McKee*, 27 Mich. 471, *Ehrgott v. Mayor, etc.*, 96 N. Y. 264 (48 Am. R. 622).

Edmund H. Applegate was called as a witness by the appellant, and among other questions asked him was this: "State what her apparent age was." To this the witness answered: "You want my opinion of her age?" and counsel, answering the inquiry of the witness, said: "Yes, sir." Whereupon the witness replied: "In my opinion she was 22 or 23, or 4 or 5; from 23 to 25 in appearance." On cross-examination appellee's counsel, pointing to a bystander named Stephen Wilstach, asked Applegate, "How old do you think he is?" and the answer of Applegate was, "Well, I think he is about 55." In giving evidence in reply the appellee called Wilstach and asked him his age, to which he replied that he was 46 years of age. We think there was no error in this ruling. It was competent for the appellee to prove that Applegate's opinion was of little or no value, because of his in-

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capacity to correctly judge of a person's age. It is said by appellant's counsel that in asking Applegate to give his opinion as to Wilstach's age, he was called upon to make a guess, but this is an erroneous assumption, for, in calling upon Applegate to give his opinion as to Wilstach's age, no more was done by appellee than was done by appellant in asking Applegate to give his opinion of Miss Falvey's age.

The testimony was not irrelevant. The rule upon this question is thus stated by Mr. Stephens: "Facts, not otherwise relevant, are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant." Stephen Ev., art. 50. The reason for this rule is that it is proper to test the capacity of the witness and to ascertain the reasonableness or establish the unreasonableness of his opinion. *Folkes v. Chadd*, 3 Doug. 157; *Davis v. State*, *supra*.

The court gave the following instruction:

"It was the duty of the plaintiff to use ordinary care, judgment and diligence in securing medical or surgical aid after she received the injuries complained of, if any she received, and if you find from the evidence that after she received such injuries, if any she did receive, she failed to use such ordinary care, judgment and diligence in procuring timely medical or surgical aid; and if you further find from the evidence that, by reason of such failure, her condition is now different and worse than it would have been if she had used such ordinary care, judgment and diligence in the premises, then, if you find for the plaintiff, you should take this into account in making up your verdict, and should not allow her any damages for ailments and diseases, if any, that may have resulted from such failure."

This instruction expresses the law correctly. One who is injured by the negligence of another is bound to use ordinary care and diligence in securing medical or surgical aid, but he is bound to no higher degree of care or diligence. Beach Cont. Neg. 21.

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The theory of the appellant's seventh instruction seems to be that the injured person must use more than ordinary care and diligence, and this is not the law. If this is not the theory of that instruction, then there is no substantial difference between it and the one given by the court.

Another instruction given reads thus:

"And so, too, it was the duty of the plaintiff to use ordinary care to cure and restore herself, and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in inclement weather, or otherwise, after receiving her injuries, if any she received in said accident, and thereby increased and aggravated such injuries and enhanced their evil effects, you will take these facts into account in arriving at your verdict—if you find for plaintiff—and should not allow any damages to plaintiff for any ailments, injuries or diseases, or their aggravation, from which plaintiff has been, or may be, suffering by reason of such exposure, and from which she would not otherwise be suffering."

We regard this instruction as unusually clear and forcible, and we are satisfied that it correctly states the law. A plaintiff is not bound to use extraordinary care to prevent an injury from developing into evil consequences, but is bound to use ordinary care and diligence. It is true that in some cases ordinary care will require a high degree of care, for care must always be proportionate to the danger, in order to be even ordinary care, but there is no requirement that in any case more shall be done than a person of ordinary prudence would do under like circumstances. Beach Cont. Neg. 22.

We are not able to perceive any substantial difference between the eighth instruction asked by appellant's counsel and that given. They say: "The court's instruction, while embodying most of the defendant's instruction, beclouds it and renders it misleading and nullifies its effect by telling the jury, in substance, that it was the duty of the plaintiff to use ordinary care to cure herself." The instruction is not sub-

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ject to this criticism. It is fair in all its parts, clear in its language, and consistent in its general tenor. It is, indeed, much clearer than that presented by counsel.

It is the law of this State, again and again declared, that where the court in one instruction states the rule of law correctly, it is not bound to repeat it in subsequent instructions. *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63; *Goodwin v. State*, *supra*, and authorities cited.

It is not proper for the court to instruct the jury what inferences of fact they shall draw from the evidence. *Union Mut. Life Ins. Co. v. Buchanan*, *supra*, see pp. 81, 82. For this reason, if for no other, the second instruction asked by the appellant was properly refused. But there is another objection to this instruction, and that is this: It is upon a collateral and isolated fact. Courts can not undertake to instruct in detail upon the effect of facts put in evidence, for, if it were otherwise, instructions would be of such length as to perplex and confound the most intelligent jury that ever went into the box.

The court gave these instructions: "A common carrier of passengers is bound to carry and transport for hire persons who are sick, weak, debilitated or predisposed to disease, as well as those who are healthy and robust; and if you find from the evidence that the plaintiff received the injuries complained of, or any of them, in the manner alleged in the complaint, and that at the time of the reception of said injuries, or any of them, the plaintiff was predisposed to malarial, scrofulous or rheumatic tendencies, but otherwise in good health, and you further find that said injuries, or any of them solely, excited or developed said predisposition to malarial, scrofulous or rheumatic tendencies, so that thereby, without the fault of the plaintiff, her present condition, whatever you may find that to be, has directly resulted, then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be.

"The court further instructs the jury that the plaintiff

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must show, by a preponderance of the evidence, that any injuries, ailments, or diseases from which she is now suffering, if any such there be, are the result of her injuries sustained at the time of the accident in evidence. And the court further instructs the jury that unless they find the facts to be so established, by a preponderance of the evidence, they can not assume that such injuries, ailments or diseases have resulted from said accident."

The first of these instructions was given upon the request of the appellee; the second upon the request of the appellant. Taken together, they express the law quite as favorably to the appellant as it had any right to ask. The instruction asked by the appellee, standing alone, contains nothing of which the appellant can justly complain. The question presented by these instructions has been before this court, in cases similar in every essential particular, at least twice, and the general principle involved has been asserted in very many cases. *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568, 580; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168). In the latter case the question was fully discussed and many authorities cited, and it is not necessary to again review the cases. It may, perhaps, be proper, as the question is an important one, to direct attention to some cases not there referred to. The case of *Baltimore, etc., R. W. Co. v. Kemp*, 61 Md. 74, was that of a passenger on a railway, injured by the company's negligence, and it was there held that if the injury developed into a cancer the company was liable for the consequences resulting from it.

In the course of the opinion it was said: "That the female plaintiff may have had a tendency or predisposition to cancer, can afford no proper ground of objection. She in common with all other people of the community had a right to travel or be carried in the cars of the defendants, and she had a right to enjoy that privilege without incurring the peril of receiving a wrongful injury that might result in inflaming and developing the dormant germs of a fatal disease. It is not for the

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defendants to say that because they did not, or could not in fact, anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued." It was also said: "The defendants must be supposed to know that it was the right of all classes and conditions of people, whether diseased or otherwise, to be carried in their cars."

In a case the same in principle as the present, the Supreme Court of Wisconsin said: "It is reasonable to expect that in certain cases, if an injury happened to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease." In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to scrofula * * constantly travel its streets and sidewalks, and that such tendency to that disease might greatly aggravate a bodily injury. Hence it had reasonable grounds to expect that if one of that class were injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard, and perhaps prevent a cure, as in this case." *Stewart v. City of Ripon*, 38 Wis. 584. The court cited, as sustaining its decision, *Oliver v. Town of La Valle*, 36 Wis. 592, and *Kellogg v. Chicago, etc., R. W. Co.*, 26 Wis. 223 (7 Am. R. 69).

We can not prolong this opinion by referring to the other decided cases, nor is it necessary that we should do so, for many are collected in *Terre Haute, etc., R. R. Co. v. Buck, supra*, and, although counsel have bestowed much labor upon their briefs, only one case is cited that even remotely opposes the doctrine of our cases. The single case cited by counsel is that of *Pullman Palace Car Co. v. Barker*, 4 Col. 344 (34 Am. R. 89), and that case has, whenever it has been referred to by other courts, been declared to be unsound. Among other courts that have denied its authority is our own. *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474 (48 Am. R. 179); *Terre Haute, etc., R. R. Co. v. Buck, supra*, see p. 352.

We can not close the discussion of this branch of the case

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better than by referring to a recent work where the subject is exhaustively discussed and many cases reviewed, and where it is said: "These rules are time-honored and indisputable, and are universally applied, except in cases where the courts cut adrift from principles. In the case of personal injuries received by passengers through the negligence of a railway company, they are especially applicable, and necessary to secure to the injured party his just rights." 2 Wood Railway Law, 1232.

The court gave the following instruction:

"4. If you find under the evidence, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, she should recover. In estimating this amount, you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of her injuries, and physical and mental suffering caused by and arising out of her injuries. In addition you may consider the professional occupation, if any, of the plaintiff, and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries; and the amount assessed should be such a sum as, in your judgment, will fully compensate her for the injuries, or any of them, thus sustained."

One of the objections urged to this instruction is, that it does not require the jury to assess the damages from the evidence in the case. There is no force in this objection. No juror of average intelligence could fail to understand that the court directed him to be guided by the evidence. Speaking of an instruction very similar to the one under immediate mention, it was said, by WORDEN, J., in *City of Indianapolis v. Scott*, 72 Ind. 196, that "The court enumerated certain matters that formed the elements of damages. But no jury of reasonable intelligence could have been misled by the charge into the supposition that such matters could be considered unless shown by the evidence. As to the latter part

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of the charge, the jury could not suppose they were authorized to find anything except from the evidence."

The instruction before us properly enumerates the elements to be considered in estimating the damages. If the capacity of the plaintiff to earn money was diminished by injury, she is entitled to be compensated, and the impairment of her ability to earn money is an element to be considered in computing the amount of the recovery. *Carthage T. P. Co. v. Andrews*, *supra*; *Indiana Car Co. v. Parker*, 100 Ind. 181, *vide auth.* p. 195; *City of Indianapolis v. Gaston*, 58 Ind. 224.

We can not disturb the verdict upon the ground that the damages are excessive. It has long been the rule in this State, declared and enforced by many decisions, that in cases of this character a new trial will not be granted unless the damages are such as to strike every one with the enormity and injustice of them, and such as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption. *Hoagland v. Moore*, 2 Blackf. 167; *Guard v. Risk*, 11 Ind. 156; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Reeves v. State, ex rel.*, 37 Ind. 441; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381 (45 Am. R. 464); *Indiana Car Co. v. Parker*, *supra*.

Judgment affirmed.

Filed Nov. 23, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—This case was orally argued and was also argued by appellant's counsel in two printed briefs of more than one hundred and fifty pages, and now, on the petition for a rehearing, they have filed an additional brief of nearly forty printed pages, but discuss no question not before discussed by them and decided by us, though they make many assertions which, if correct, would convince us that our former

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opinion was erroneous; as, however, assertions are not arguments, we can not yield our convictions.

We held in the previous opinion, that as the trial court had offered to sustain appellant's motion to strike out part of Dr. O'Ferrall's testimony, and as appellant had resisted and had withdrawn the motion, which was afterwards renewed by the appellee and sustained by the court, appellant had no just reason to complain. We confess our inability, notwithstanding the abundance of assertion, to see anything in appellant's criticism on our ruling that bears any resemblance to reason. If there is any rule of practice that will permit a party to successfully complain, where the trial court offers to sustain a motion made by him, it has certainly hitherto escaped the notice of the courts and law-writers. It is said by counsel: "Will the court countenance a motion of this character where it shows on its face that it is a mere pretext to avoid the error of the admission of incompetent evidence put in such a shape as not in fact to advise the jury of what was stricken out, but left so that the testimony pretended to be stricken out had its full force and effect with the jury, which error the trial court intensified and enhanced by permitting the opinion founded thereon to stand?" This question, like much else in the brief, contains assertions that are without support, and in this instance these assertions are not just to the trial court, to opposing counsel, or to this tribunal. There was nothing on the face of the motion which showed it to be a mere pretext, nor was there anything done by the trial court to mislead the jury. The opposing counsel offered to permit the motion made by the counsel of the appellant to be sustained just as they had made it; they refused and withdrew the motion, so that if they did not secure what they desired, the fault was their own. It was not for the trial court nor for opposing counsel to suggest to the learned counsel what it was that they wanted; it was enough to offer them what they asked.

We need not follow counsel in their discussion of the ques-

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tions which might, perhaps, have arisen on Dr. O'Ferrall's testimony, if proper objections had been made and exceptions reserved; but as no such objections were made, there is no question presented for our decision. We may, however, remark of counsel's criticism on the opinion in *Cleveland, etc., R. R. Co. v. Newell*, ante, p. 264, that the doctrine there declared rests on solid principle, and is sustained by the decisions of the ablest courts of the land, as appears from the cases there cited, and from those referred to in our former opinion in this case.

It is asserted by counsel that we were in error in referring to the fact that Dr. Webster expressed an opinion. To this assertion of counsel a quotation from the record shall be our answer. On direct examination the counsel asked Dr. Webster this question: "What, in your medical opinion, Doctor, is the usual cause of such a phenomenon?" Answer. "Syphilis is the usual cause." Counsel say: "We despair of getting the law correctly enunciated unless we can get this court to look at the facts, and with this end in view we make the following extracts from Dr. Webster's testimony." Not stopping to speak in censure, as, perhaps, we should of the impropriety of this statement, we pass it with the remark that it is counsel, and not the court, that have overlooked the facts which appear in the record. Counsel print part of the examination of Dr. Webster, but only part, while we read his entire testimony. The opinion called for by counsel's question is not in the part of Dr. Webster's testimony printed in the brief, but, for all that, it is in the record.

The proposition made in our former opinion, that a person injured by the negligence of a carrier may recover although the injury was increased by a predisposition to disease, is assailed, but no authorities are cited that discuss the question. Our former decision upon this point was fortified by decisions of our own and many other courts, and since that opinion was written we have found others to which it may not be improper to refer. In the very recent case of

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McNamara v. Village of Clintonville, 62 Wis. 207 (51 Am. Rep. 722), the subject is exhaustively discussed, and a great number of cases, among them some of our own, are cited. The court there said: "The predisposition to inflammatory rheumatism was an intervening cause, but it was set in motion by the tortious act complained of." The subject was much discussed in *Ehrgott v. Mayor, etc.*, 96 N. Y. 264 (48 Am. Rep. 622), where it was said, "When a party commits a tort resulting in a personal injury, he can not foresee or contemplate the consequences of his tortious act. He may knock a man down, and his stroke may, months after, end in paralysis or in death—results which no one anticipated or could have foreseen. A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused." Again, in the same opinion, it is said: "While both causes were proximate, that was the nearest and most direct. Still further. It was certainly impossible for the plaintiff to prove, or for the jury to find how much of the injury was due to either cause alone. It was wholly impossible to apportion the damage between the two causes. Shall this difficulty deprive the plaintiff of all remedy? We answer no. The wrong of the defendant placed the plaintiff in this dilemma, and it can not complain if it is held for the entire damage."

All the cases and all the authors that have given this subject careful consideration, so far as a diligent search in this and other cases has enabled us to discover, treat the rule laid down in the *Squib* case as applicable to all cases of negligence; not an author nor a decision confines it to the case of an intentional tort. 2 Thompson Negligence, 1084; 3 Sutherland on Damages, 714; Addison on Torts (3d ed.), p. 5; Cooley on Torts, 70. The length of the counsel's brief indicates that they have been industrious at least, and they have cited no case that lends their position the slightest support. A recent writer, from whom we quoted in our former

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opinion, says of a position similar to that assumed by the appellant's counsel, that "it is the rankest nonsense to say that there is no such immediate connection between the wrong and the injury as to entitle the passenger to recover," and this is said after a very full examination of the adjudged cases. 2 Wood Railway Law, 1232. The instruction given by the court upon this subject, if it stood alone, would be correct, and taken, as all our cases and all the text-writers upon the subject say it must be, in conjunction with that given at the request of the appellant, which, by the way, asserts a doctrine utterly at variance with that now contended for, leaves no room to doubt that the jury were properly instructed.

In stating the reason why a rehearing should be granted, counsel say: "Because counsel for appellant, through inadvertence, failed to call attention to the cases of *Chicago, etc., R. R. Co. v. Sykes*, 96 Ill. 162, and *North Chicago Rolling Mills Co. v. Morrissey*, 18 Am. & E. R. R. Cases, 47, where a very different view of what the average intelligence of a juror could fail to understand, is expressed." The first of those cases asserts the doctrine of comparative negligence, and condemns an instruction which assumes to state facts which will entitle the plaintiff to recover in an action brought to recover damages for injuries received in attempting to enter a railroad train. The instruction was condemned because it assumed facts that should have been left with the jury, and because it left the jury at liberty to assess damages at any amount they chose, not exceeding five thousand dollars, irrespective of the evidence. The doctrine of comparative negligence has always been denied in this State, and there is nothing in our former opinions, nor in the cases cited from our reports, that affirms that a jury may assess damages irrespective of the evidence, or that the court may usurp the province of the jury by assuming facts, so that the decision under immediate discussion has not the slightest bearing upon this case. The second of the two cases simply decides that it is error to disregard the question of contributory negligence, and to give an in-

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struction allowing a jury to award damages "without the slightest reference to any proof of the amount of damages sustained." There is nothing in either of those cases that conflicts with the decision in *City of Indianapolis v. Scott*, 72 Ind. 196, but if those cases did place the intelligence of jurors upon a plane as low as that which counsel would have us do, we should decline to follow them, for the cases in our own State, as well as elsewhere, declare that jurors are to be treated as men of average intelligence. *Union Mutual L. Ins. Co. v. Buchanan*, 100 Ind. 63, see p. 74; *McDonel v. State*, 90 Ind. 320, see p. 327. We are, at all events, quite content to so treat the jurors of Indiana. But, if we should adopt counsel's theory that the instruction of the trial court was understood by the jury to leave them at liberty to assess damages irrespective of the evidence, we should rate their intelligence very low, indeed much lower than that possessed by rational men of the lowest order of intellect.

Petition overruled.

Filed Feb. 17, 1886.

No. 6770.

REEVES v. HOWES ET AL.

MARRIED WOMAN.—Mortgage.—Estoppel.—A married woman, who is not bound by a debt nor by the covenants of a mortgage given to secure its payment, is not estopped from claiming title to land conveyed to her in exchange for the mortgaged property, by a *bona fide* purchaser of the latter before the recording of the mortgage.

PRACTICE.—Pleading.—Where the complaint is bad, the overruling of a demurrer to an insufficient answer is not available error.

From the Wayne Circuit Court.

J. P. Siddall, W. D. Foulke and J. L. Rupe, for appellant.
C. H. Burchenal and C. B. Walker, for appellees.

104	435
137	47
104	435
141	263
104	435
152	580
104	435
162	491

Reeves v. Howes *et al.*

WOODS, C. J.—Counsel for the appellant have stated the case and the propositions on which they rely as follows:

"This action was brought by appellant, Reeves, upon a note of the appellee James B. Howes, secured by a mortgage executed by said appellee and Maggie A. Howes, his wife, upon forty-two acres of his land in Wayne county. The mortgage was not recorded until after defendants Howes had exchanged the land mortgaged with defendant Rothert, a purchaser in good faith, for lot 38, in Roberts and Brown's addition to Richmond, the deed to which lot was taken in the name of Maggie A. Howes. It was sought to recover judgment against J. B. Howes on the note, to have the mortgage declared a lien upon lot 38, and to have the conveyance from J. B. Howes to his wife, by means of this exchange, set aside as fraudulent and without consideration, J. B. Howes being insolvent at the time. Judgment was recovered by plaintiff against J. B. Howes on the note, but in favor of Maggie A. Howes upon the other issues; and from the judgment in favor of Maggie A. Howes the plaintiff appeals.

"We insist that the mortgage lien has been transferred from the forty-two-acre farm to lot 38, upon each of the three following grounds, each being independent of the others:

"*First.* Because every mortgage, while it may not establish a technical trust, yet creates a fiduciary relation in so far that it imposes upon the mortgagor the duty, in conscience and equity, to do no *affirmative* act which shall destroy or impair the value of the security, and that Howes, by exchanging the mortgaged property with Rothert for lot 38, and conveying the mortgaged property to Rothert free from encumbrances thereby destroyed the security, and that a trust is consequently imposed upon lot 38, being the proceeds of such mortgaged property.

"*Second.* That even if such mortgage originally created no trust of any description, yet the fraudulent act of Howes in transferring the mortgaged property to a purchaser in good faith in such manner as to extinguish the lien of the mortgage,

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thereby created a trust and made the proceeds of the mortgaged property subject to the same lien as the original property.

“Third. That inasmuch as Reeves’ mortgage interest in the mortgaged property constituted part of the consideration paid for lot 38, and such interest was used in the purchase of said lot without Reeves’ consent, a resulting trust arose in favor of Reeves upon lot 38.”

It is assumed, throughout the very elaborate and learned argument of counsel for the appellant, and necessarily so, as it is the pivot of the argument, that the mortgaged premises, when mortgaged and when conveyed to Rothert, were owned by James B. Howes, the maker of the note secured by the mortgage.

On examination of the complaint, however, we find in it no averment in respect to the ownership; and from the entire pleading, including exhibits, some of which can not be regarded because they are not proper exhibits, it is not possible to infer in favor of the pleader, that the ownership was as it has been assumed to have been. The only allegations which may be deemed relevant to the point are, that the mortgage was made by James B. Howes and his wife, Maggie, and that they both, with the intent to defraud the plaintiff, made the bargain with Rothert and conveyance to him. It can not be said, therefore, whether the land was owned by the husband or wife, or by both, or, indeed, that either of them had title, and it necessarily follows that the questions discussed are not presented.

Mrs. Howes was not personally bound for the debt, nor by the covenants of the mortgage given to secure its payment, and, consequently, is not estopped by contract from asserting title to the land conveyed to her, even if the positions of counsel for the appellant be conceded. As against her, therefore, the complaint is not good, and the overruling of a demurrer to an answer could not have been error.

Judgment affirmed.

Filed March 7, 1883; petition for a rehearing overruled Jan. 26, 1886.

 Carver v. Lewis, Administrator.

No. 12,073.

CARVER v. LEWIS, ADMINISTRATOR.

104	438
136	104
104	438
155	60

DECEDENTS' ESTATES.—Final Settlement.—Collateral Attack.—The approval by the proper court of the final settlement account of an administrator is an adjudication of all questions involved, and can not be collaterally attacked.

SAME.—Action Against Administrator after Discharge.—Omission of Property from Inventory.—Conversion.—Trusts.—While the final settlement of a decedent's estate remains in force, it is conclusive upon the parties interested, and an action can not be maintained against the discharged administrator to recover the proceeds of notes, belonging to the estate, which he failed to include in the inventory and account for but converted to his own use. Nor can the fact that such notes were held by the administrator, before his appointment as such, as trustee for the decedent while living change the case.

From the Putnam Circuit Court.

H. H. Mathias and *J. B. Black*, for appellant.

D. E. Williamson and *A. Daggy*, for appellee.

ZOLLARS, J.—By this action appellant is seeking to have a claim allowed against, and collected from the estate of Jacob Durham, deceased, of which estate appellee is administrator. She filed an amended complaint in the circuit court, to which a demurrer was sustained. For a review and reversal of that ruling she prosecutes this appeal.

The conclusion we have reached as to the correctness of that ruling renders it unnecessary for us to set out the entire complaint, either at length or in substance. So much of it as presents the controlling question may be summarized as follows: In 1847, Jacob Durham advanced to his son, Benjamin A. Durham, a tract of land, worth about \$3,500, and surrendered to him its possession. He did not convey the legal title, but treated the land as the absolute property of Benjamin A. Benjamin A. took possession of the land, and occupied it until 1860, in the meantime having expended upon it \$4,000 in the way of valuable and lasting improvements. On the 9th day of January, 1860, Benjamin A. en-

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tered into a contract with one Williams for an exchange of lands, by the terms of which he was to cause a legal title to be conveyed to Williams, and Williams was to give his notes and mortgage for \$2,500, as the difference in value between the tracts of land. On that day, at the request of Benjamin A., Jacob Durham conveyed to Williams the legal title to the lands so occupied by Benjamin A., and, over his objections and protest, took the notes and mortgage from Williams in his own name, and took and held the possession of the same. Benjamin A. died intestate, in June, 1860, leaving appellant, as his widow, and four minor children. In August, 1860, Jacob Durham was appointed administrator of the estate of Benjamin A. He proceeded with the administration of the estate, closed it up, and was finally discharged in June, 1862. It is averred in the complaint that he paid all the debts against the estate, and distributed the residue to the heirs.

It is charged that he failed to inventory the said notes and mortgage as a part of the estate, or in any manner refer to or account for them in the administration of the estate. While administrator, he collected \$130 upon the notes, and afterwards \$1,200. Jacob Durham died in 1864. His administrator took possession of the notes and mortgage as a part of his estate, and collected the balance due upon them.

It is further charged in the complaint, and insisted upon in argument, that by reason of the facts above stated, Jacob Durham held the notes and mortgage as the trustee of Benjamin A.

It will be observed that all debts against the estate of Benjamin A. Durham were paid, distribution of the surplus was made, a final report was filed, a final accounting was had, the estate was settled and closed, and Jacob Durham, as administrator, was discharged in June, 1862.

No objection is shown to have been made to the final report or discharge of Jacob Durham as such administrator; no effort was made to recover from him the notes and mort-

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gage, or the money collected upon them, nor has there been any other effort to collect the amount from his estate until this action was instituted in 1882. The final report of Jacob Durham as such administrator has not been set aside, nor has there been any effort to set it aside. Such being the case, the important and controlling question is, can appellant maintain this action notwithstanding such final settlement?

We could not presume, in order to strengthen appellant's complaint, that at the time of the final settlement she was under legal disability, because it appears from the complaint that at the time this action was commenced, and for some three years prior thereto, she was a married woman; and if we could, it would be of no avail to her in this case, because she is not proceeding to have that final settlement set aside, but is proceeding regardless of it.

The law in force during the administration of the estate required, as it does now, that the administrator should make a full inventory of the personal estate of the decedent, within his knowledge, including all demands in favor of the estate, with a particular description thereof, etc., and that he should return such inventory to the county clerk, and take an oath to be endorsed upon, or annexed to it, that the same was a true statement of all the personal estate of the deceased which had come to his knowledge. 2 R. S. 1876, pp. 505, 508, sections 34, 44, 46.

From such inventory the widow had the right to select articles to the amount of five hundred dollars. It was the duty of the administrator to collect all claims and demands of every nature due to the estate, and report to the court at stated times. Provision was also made for a final accounting and final settlement of the estate, and distribution to the heirs. All of these matters, and the doings of the administrator, became matters of record, open to the inspection of all interested.

The above mentioned provisions of the statute were followed by section 116, which provided that, "After the debts

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and legacies of an estate and charges of administration are paid, and all claims in favor of such estate are disposed of according to law, the executor or administrator shall be discharged from the further administration thereof, and no final settlement shall be revoked or re-opened, except by appeal to the circuit court, and the same shall there appear to have been illegally made: *Provided, however,* That any person interested in said estate so settled, may have said settlement set aside for mistake or fraud, at any time within three years after said settlement, and if such person be under any legal disabilities at the time of said settlement, then within three years after the removal of such disability." 2 R. S. 1876, p. 537. See, also, R. S. 1881, sections 2402, 2403.

Involved in the administration and final settlement of estates under the above statutes, were the questions, as to whether or not the administrator had made an inventory of, and turned into the estate, all of the personal estate belonging to it, and all claims of every nature due to it, whether evidenced by notes or accounts. The inventory, filed under oath, would show upon its face that all such were included, and the reports would necessarily show the collection or proper disposition of them. The approval of the final settlement and account in this case, as in all similar cases, was an adjudication of those questions, and an adjudication that became final and conclusive, unless appealed from, or assailed for mistake or fraud within three years after the final settlement; that adjudication can not be disregarded nor overthrown in a collateral attack by any of the interested parties. It is alleged here, that the notes held by Jacob Durham were not included in the inventory, nor were they accounted for by him, although they belonged to the estate of Benjamin A. Durham.

The approval of the final settlement account, the discharge of the administrator, and the final settlement of the estate, were an adjudication that all of the notes and accounts belonging to Benjamin A. Durham, or in which he had any

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interest, were included in the inventory and properly accounted for. And hence, so long as that final settlement and adjudication stands, appellant, as one of the interested parties, can not be heard to say that there were other notes in the hands of the administrator which he did not include in the inventory, and for which he did not account. And because she can not do this, she can not maintain this action.

It is argued that Jacob Durham, by virtue of the above facts, held the notes as trustee for Benjamin A. before he was appointed administrator. That fact, if conceded, could not possibly change the case. If Jacob Durham, in fact, held the notes as trustee, that did not of course destroy the ownership in Benjamin A.; they were still his, and after his death should have been included in the inventory, and collected as any other notes that might have been due to him. And if, in such case, Jacob Durham, as administrator, neglected to inventory the notes and turn them into the estate, the case is precisely the same as if he had neglected to inventory any other notes and had converted them to his own use.

The holding of our cases is, that the approval of the final settlement account, and the final settlement of the estate by the probate court, are an adjudication of all questions involved and can not be assailed in a collateral attack, and that so long as such final settlement stands, interested parties are bound by it, and can not maintain an action against the discharged administrator upon the ground that he converted to his own use assets of the estate which he should have included in the inventory and accounted for to the estate, and that such final settlements can not be set aside after three years subsequent thereto. Upon this, it would not be profitable to extend this opinion further than to cite the cases. *Pate v. Moore*, 79 Ind. 20; *Peacocke v. Leffler*, 74 Ind. 327; *Sanders v. Loy*, 61 Ind. 298; *Holland v. State, ex rel.*, 48 Ind. 391; *Barnes v. Bartlett*, 47 Ind. 98; *Candy v. Han-*

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more, 76 Ind. 125; *Reed v. Reed*, 44 Ind. 429; *Vestal v. Allen*, 94 Ind. 268.

There may be cases where to apply the doctrine of *res adjudicata*, and the limit fixed by the statute within which final settlements may be set aside, may work a hardship, but doubtless such cases will be very few in comparison with the wrongs that would result from an opposite doctrine, and a statute fixing a much longer, or no limit. If the doctrine were not so applied, and the statute fixed no limit, great wrongs might, and doubtless would, result from the prosecution of unfounded claims against the estates of deceased administrators and their bondsmen.

Appellant is not in a favorable position to complain of any hardship resulting to her. So far as shown, she in fact knew that the notes were not included in the inventory, nor accounted for by the administrator as belonging to her husband's estate. So far as shown, she knew of the notes, and all that she now alleges in relation to them, at the time of the final settlement, and before that time, as well as she does now. The way was open to her to have the notes included in and accounted for as a part of the estate. She might have had the final report set aside within three years after its approval. She, however, did nothing, and objected to nothing, until more than twenty years after the approval of the final settlement, and eighteen years after the death of the administrator.

It results from what we have said, that the court below was not in error in sustaining the demurrer to the complaint. Whether or not appellant might, in any event, maintain an action except through an administrator, is a question we need not now decide.

The judgment is affirmed, at appellant's costs.

Filed Oct. 10, 1885; petition for a rehearing overruled Jan. 6, 1886.

Garmire v. The State.

No. 12,680.

GARMIRE v. THE STATE.

104	444
156	897

104	444
168	168

CRIMINAL LAW.—Forgery.—A forged instrument reading, “Mr. Allen—Please let A. Garmire have team to go to Mongo, and charge same to me.” (signed) “T. Hudson,” is within the statute defining the crime of forgery. *State v. Cook*, 52 Ind. 574, doubted.

SAME.—It is sufficient in such cases if the instrument bears such a resemblance to the document it is intended to represent as is calculated to deceive.

SAME.—Indictment.—Mistake in Designating Character of Instrument.—Where an instrument is set forth, a mistake of the pleader in designating its character does not vitiate the indictment.

SAME.—Statement of Intent.—An allegation in the indictment, that the instrument was forged and uttered with the “felonious intent to feloniously cheat and defraud,” etc., is a sufficient statement of the criminal intent.

SAME.—Erroneous Date of Instrument.—Statute of Limitations.—One who has forged a written instrument can not avail himself of the fact that a wrong date was prefixed thereto, but the true date, showing that the statute of limitations has not run, may be alleged in the indictment.

SAME.—Witnesses.—Expert.—Statute.—Section 1801, R. S. 1881, refers to expert witnesses, and does not apply to a case where the witnesses testify as to facts within their own knowledge.

From the LaGrange Circuit Court.

O. L. Ballard and *H. G. Zimmerman*, for appellant.

F. T. Hord, Attorney General, *F. D. Merritt*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—There are two counts in the indictment upon which the appellant was convicted; one charges the forgery of the instrument of writing set forth, and the other charges the appellant with feloniously uttering the forged instrument. The instrument reads thus:

“LAGRANGE, June 19th, 1881.

“MR. ALLEN—Please let A. Garmire have team to go to Mongo, and charge same to me. T. HUDSON.”

We regard this instrument as within the provisions of our statute defining the crime of forgery, for we think it is not merely a request for the delivery of property, but that it is a

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writing obligatory promising to pay for property. The hire of the team was property of value to Allen, and the instrument purports to contain a promise to pay the hire. Such a promise is clearly implied in the clause, "and charge same to me," for it would be unreasonable to assert that where a person asks that the value of property furnished on his order be charged against him, he intends that the charge shall be a mere idle and senseless form. We do not understand the case of *State v. Cook*, 52 Ind. 574, to decide that the forgery of such an instrument as the one set out in the indictment before us is not within our statute; on the contrary, we understand that case to decide, that where proper extrinsic facts are alleged, an indictment founded on such an instrument will be good. We need not critically examine the statements found in the opinion in that case to ascertain whether they do, or do not, correctly state the law, for we are only bound to regard as authoritative the conclusion reached and announced. It is not improper, however, to say that many of the statements contained in that opinion are of doubtful soundness, and the entire opinion so inharmonious and inconsistent as to make the case one of questionable authority. The very decided weight of authority sustains the view we have taken of the character of the instrument set forth in the indictment. *United States v. Book*, 2 Cranch C. C. 294; *United States v. Brown*, 3 Cranch C. C. 268; *State v. Morgan*, 35 La. Ann. 293; *State v. Ferguson*, 35 La. Ann. 1042; *Anderson v. State*, 65 Ala. 553; *Burke v. State*, 66 Ga. 157; *Peete v. State*, 2 Lea (Tenn.) 513; *State v. Keeter*, 80 N. C. 472; *People v. Shaw*, 5 Johns. 236; *Commonwealth v. Fisher*, 17 Mass. 46.

The rule unquestionably is, that the indictment must show that the instrument is one having some legal effect, but it is not necessary that it should be shown to be a perfect instrument. 2 Bishop Crim. Law, section 536; *Reed v. State*, 28 Ind. 396. An instrument such as the one before us is one of legal efficacy, for it purports to create a pecuniary obliga-

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tion against the person whose signature is forged. *Anderson v. State, supra.*

Where an instrument is set forth, a mistake of the pleader in designating its character does not vitiate the indictment. *Harding v. State*, 54 Ind. 359; *Powers v. State*, 87 Ind. 97; *Myers v. State*, 101 Ind. 379.

The indictment alleges that the instrument was forged and uttered with the "felonious intent to feloniously cheat and defraud the said Aaron W. Allen." This is a sufficient statement of the criminal intent, although there is a useless repetition of epithets. In this class of cases, "all that need be done is to characterize by appropriate words the intent essential to the existence of the particular offence charged." *State v. Miller*, 98 Ind. 70.

We think that the indictment does show that the instrument set forth purported to be signed by Timothy Hudson. It is not necessary to employ the exact words of the statute, for it is well settled that it is sufficient if equivalent terms are used. *State v. Miller, supra.*

The objection based upon the fact that the date of the instrument appears to be June 19th, 1881, is without merit. The indictment explicitly charges that it was forged and uttered on the 19th day of June, 1885, and this shows that the statute of limitations has not run. A forger can not escape punishment by prefixing a wrong date to the instrument which he forges. It would be a reproach to the law if it permitted one who forges an instrument for the felonious purpose of defrauding another to go acquit upon the ground that the date prefixed to the instrument was not the true one. It is sufficient in such cases as this, if the instrument "bears such a resemblance to the document it is intended to represent as is calculated to deceive." *State v. Ferguson, supra.* Roscoe Crim Ev. (7th ed.) 545.

One who intends to commit a felony, and succeeds in accomplishing his evil purpose, can not escape the consequences of his crime by denouncing as stupid the man who trusted

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him. Nor can he be heard to aver that if the man whom he intended to defraud, and whom he did defraud, had been more vigilant, the crime could not have been perpetrated. Felons can not escape punishment upon the ground that the person whom they deliberately set to work to wrong was lacking in care and vigilance.

Section 1801, R. S. 1881, refers to expert witnesses, and does not apply to a case where the witnesses testify as to facts within their own knowledge. That section, although not very happily worded, applies to cases where the witnesses testify as to matters of opinion, and not to cases where they testify as to matters of fact.

We can not disturb the verdict upon the evidence. Judgment affirmed.

Filed Jan. 5, 1886.

No. 11,878.

104	447
130	351

LOWERY v. CARVER, ADMINISTRATOR.

SUPREME COURT.—*Bill of Exceptions.—Evidence.—Long-hand Manuscript.*—

A clerk of the circuit court has no authority to incorporate the long-hand manuscript of the evidence into a bill of exceptions, unless a place is indicated therein where such manuscript may be inserted, as provided in section 626, R. S. 1881.

SAME.—Long-hand manuscript of the evidence will not constitute a part of the record on an appeal to the Supreme Court, unless the same is incorporated into a bill of exceptions.

SAME.—Where a bill of exceptions is signed and filed in the court below before the long-hand manuscript of the evidence has been written out, and no place is indicated in the bill where the same may be inserted, and such manuscript is not filed until six months later, and neither signed nor certified by the judge of the court, the same is not properly before the Supreme Court, and can not be considered.

From the Hamilton Circuit Court.

R. D. Logan, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellee.

Lowery v. Carver, Administrator.

Howk, J.—The only error assigned by the appellant, which is properly assigned, is the overruling of his motion for a new trial. In this motion the only causes assigned for such new trial were as follows:

“1st. The verdict of the jury is not sustained by sufficient evidence; and,

“2d. The verdict of the jury is contrary to the law and the evidence.”

It is manifest, therefore, that this appeal presents no question for our decision, if the appellee is right in claiming, as he does, that the evidence given on the trial is not properly in the record.

It appears from the record that, at the September term, 1883, of the court below, the issues in this cause were tried by a jury; that a verdict was returned for the appellee, the plaintiff below, and that a judgment and decree were made and rendered by the court in accordance with the verdict and as prayed for in the complaint. It further appears that, at the same term of the court, the appellant moved the court in writing for a new trial of this cause, for the reasons hereinbefore stated. But it is not shown by any order-book entry of the proceedings of the court, that the motion for a new trial was ever ruled upon or decided, or that any time was either asked for or given within which any bill of exceptions might be filed. Two weeks after the filing of the motion for a new trial, and during the same term of court, the appellant appeared and filed his only bill of exceptions in this cause. Omitting the title and venue of the cause and the signature of the judge, this bill of exceptions was in the words and figures following, to wit:

“Be it remembered, that, on the — judicial day of the September term of the Hamilton Circuit Court, the above entitled cause came on for trial, the same being submitted to a jury; that after hearing the evidence, which was taken down by Ira A. Kilbourne, the short-hand reporter, and incorporated into and made a part of this bill of exceptions, which was

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all the evidence given in the cause, the argument of counsel and the charge of the court, and, after due deliberation, said jury found a verdict for the plaintiff, in the words and figures, to wit: (Here insert the verdict.) After the return of such verdict into open court, the defendant, by his counsel, R. D. Logan, Esq., moved the court in writing for a new trial. (Here insert the motion.) And after due deliberation the court overruled said motion; and, at the proper time, the defendant's counsel objected and excepted to the overruling of said motion for a new trial, and prayed that his bill of exceptions in that behalf might be allowed, which is accordingly done, and, upon his motion, the same is ordered to be made a part of the record in this case."

It is clear that the long-hand manuscript of the evidence was not incorporated into, nor made part of, the bill of exceptions at the time it was signed by the judge and filed in the cause. It is clear, also, that the clerk of the court had no authority to incorporate the long-hand manuscript of the evidence into such bill of exceptions, because no place was indicated therein where such manuscript might be inserted, by the use of the words "here insert," as provided in section 626, R. S. 1881. It is equally clear that the long-hand manuscript of the evidence, under the provisions of section 1410, R. S. 1881, will not constitute a part of the record on an appeal to this court, unless "the same shall have been incorporated in a bill of exceptions." In *Galvin v. State, ex rel.*, 56 Ind. 51, the court said: "The long-hand manuscript of the evidence, taken by a short-hand reporter, can only be certified to this court, as a part of the record, under the statute, 'when the same shall have been incorporated in a bill of exceptions.' The manuscript of the evidence, in this case, was not incorporated in a bill of exceptions, and therefore it forms no part of the record of this cause." So, in *Woollen v. Wishmier*, 70 Ind. 108, after quoting section 1410, *supra*, the court said: "This section does not change the practice in making

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testimony or oral evidence a part of the record by a bill of exceptions, but simply provides that the long-hand manuscript of a short-hand reporter, 'when the same shall have been incorporated in a bill of exceptions,' may be used as a part of the transcript of the record, and the clerk shall not charge fees therefor. * * * * There is no method provided by law to make testimony, or other oral evidence, a part of the record, except to incorporate it into a bill of exceptions. To incorporate such evidence into a bill of exceptions means to make it a part of the body of the bill of exceptions, by some method known to the law." Where the long-hand manuscript of the evidence has not been written, at the time the bill of exceptions is signed and filed, the only method known to the law for making such manuscript a part of the body of such bill, so far as we are advised, is the one provided in section 626, *supra*, already referred to.

In the case in hand the bill of exceptions, heretofore copied in this opinion, was signed by the judge and filed in the court below, on the 1st day of October, 1883. In the transcript of the record, filed on this appeal, the bill of exceptions is followed by what purports to be the long-hand manuscript of the evidence, taken by the short-hand reporter on the trial of this cause. There is no memorandum, recital or file-mark of the clerk in the transcript before us to indicate when, if ever, this long-hand manuscript was filed in the circuit court. It was certified, however, by the short-hand reporter on the 15th day of March, 1884, and we may well conclude, as we do, that it was not filed in the court below until on, or after, the day last named. This was nearly six months after the filing of the bill of exceptions, and long after the expiration of the September term, 1883, of the trial court; and yet, as we have seen, no time beyond the term was asked for or given wherein a bill of exceptions might be signed and filed. We may add that what purports to be the long-hand manuscript of evidence was neither signed nor certified by the judge of

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the trial court, and therein the case at bar differs from *Dennis v. State*, 103 Ind. 142.

In the case under consideration we are of opinion that the evidence given on the trial is not a part of the transcript of the record, and that, in the absence of the evidence, no question is presented for our decision by appellant's assignment of error.

The judgment is affirmed, with costs.

Filed Jan. 5, 1886.

No. 12,283.

CULBERTSON ET AL. v. MUNSON ET AL.

PLEADING.—*Complaint Good as to Part of Relief Asked.*—*Demurrer.*—A complaint which is sufficient as to part of the relief asked will repel a demurrer although insufficient as to other relief.

TAXES.—*Deed.*—*Void Sale.*—*State's Lien.*—The holder of the auditor's tax deed is entitled to enforce the State's lien, even if the sale is void, except where it is invalid for the causes enumerated in section 6495, R. S. 1881.

SAME.—*Enforcement of Lien.*—*Contract.*—*Agency.*—Mere representations by the vendee of a tax claim to the vendor, that he purchases it in the interest of the owner of the land, and thereby secures it at a reduction on the sum due, will not, in the absence of an agency or an agreement that the owner is to have the benefit of the reduction, prevent him from enforcing the lien for the full amount due.

SAME.—*Interest.*—*Act March 5, 1883.*—Under sections 3 and 4 of the act of March 5th, 1883, the purchaser at a tax sale, whether made before or after the taking effect of such act, is only entitled to interest at the rate of twenty per cent.

From the Marshall Circuit Court.

D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellants.

M. A. O. Packard and M. S. Coulter, for appellees.

104	451
148	440
104	451
147	572
104	451
153	494
104	451
166	364
104	45
169	64

MITCHELL, J.—The plaintiffs brought this action to quiet title to a certain one hundred and sixty acre tract of land in Marshall county.

The defendants, after filing a general denial to the complaint, filed a cross complaint in two paragraphs, in both of which they sought to quiet the title to the same land in themselves.

In the first paragraph of the cross complaint, it was averred that the cross complainants were the owners, and in possession of the land described, and that the plaintiffs were asserting an unfounded title to it.

The second paragraph rested the right of the cross complainants specifically on a tax sale, and a title which it was alleged had accrued to them thereunder. It was also averred in the second paragraph that the cross complainants had made lasting and valuable improvements on the land while in possession under the tax deed. As alternative relief, this paragraph prayed that, in the event the cross complainants' title should prove defective, the court ascertain the amount due them for taxes, penalties, improvements, etc., and decree a lien in their favor for the amount.

Upon the final trial, it was decreed that the plaintiffs were the owners of the land, and that their title should be quieted, subject to a lien in favor of the cross complainants for the sum of \$640.80, for taxes, interest, penalties, etc., and in the further sum of \$300 for improvements.

The court below having overruled the plaintiffs' motion for a new trial, they have brought the record here on appeal, and assign for error the overruling of their demurrer to the cross complaint, and overruling their motion for a new trial.

The first paragraph of the cross complaint is not assailed. It is insisted, however, that the second is bad, for the reason that in specifying the character of title under which they claim, the cross complainants have not averred all the requisites of a good title.

It may be true that the paragraph under consideration was

not sufficient as a complaint to quiet title. The fact must be kept in view, however, that part of the relief demanded was, if the title asserted therein should prove defective, that the court should decree a lien for the taxes paid, together with the interest and penalties thereon and the improvements made by the defendants. It was, therefore, sufficient as to part of the relief demanded, and when a complaint is so far sufficient a demurrer to it is properly overruled. *Locke v. Catlett*, 96 Ind. 291, and cases cited.

It is argued that upon the facts stated the sale for taxes was unauthorized and void. If this view were conceded, yet, since the auditor issued his deed upon such sale, and the sale does not appear to have been invalid for any of the causes enumerated in section 6495, R. S. 1881, the holders of the deed were entitled to enforce the State's lien for taxes which, although the sale was utterly void, was nevertheless transferred to them. *Locke v. Catlett*, *supra*.

It appeared in evidence that one Jones was at one time the owner of the tax title, and that, at the request of Fred W. Munson, he transferred the title thus held to Stephen Munson, through whom the defendants claim. The sale from Jones to Stephen Munson was negotiated by Fred W. Munson. Stephen Munson subsequently transferred his interest to Fred W. and Louis L. Munson. The plaintiff offered to prove by Jones that Fred W. Munson, at the time the sale to Stephen Munson was negotiated, represented that he was acting for his (Munson's) wife and the plaintiffs, in making such purchase, and that he was making it for their benefit, and that by reason of these representations Jones was induced to sell his tax title for less than was actually due according to law. This evidence the court excluded, the defendants having withdrawn any objection to it.

It is argued that it was a legitimate defence to the appellees' claim to enforce a lien on the land for taxes, to show that they acquired their claim by misrepresentations made to Jones; that because Fred W. Munson, in negotiating the

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sale from Jones to Stephen Munson, represented that he was acting on behalf of his wife and for the plaintiffs, Stephen Munson took the tax claim in trust for the plaintiffs, and that the transfer from Stephen Munson to Fred W. and his brother made them nothing more than trustees. The case of *Gwaltney v. Wheeler*, 26 Ind. 415, is relied on.

We do not think the case cited controls the case before us. In that case the facts were that Reitz and Haney recovered judgment against Wheeler, with a decree of foreclosure of a mortgage on real estate. Reitz and Haney sold the real estate upon the judgment, becoming the purchasers at the sale. Wheeler, the judgment debtor, about this time entered the military service of the United States and went to the seat of war. While Wheeler was thus absent, the appellant Gwaltney went to Reitz and Haney and fraudulently pretended to them that he was interested in the welfare of Wheeler's wife, and desired to procure the real estate, or the proceeds thereof, for her benefit, and to secure to himself a small debt due him from Wheeler, and proposed to purchase the land from Reitz and Haney for the benefit of Wheeler's wife. He agreed to pay Reitz and Haney \$400, take an assignment of the certificates of sale, sell the property, and out of the proceeds retain the \$400 paid them, the debt due himself, amounting to \$40, and pay the balance to Wheeler's wife. Reitz and Haney were moved by this promise and pretence, and in consideration thereof assigned the certificates to Gwaltney. Gwaltney afterwards sold the land for \$2,800, and failed to pay any part thereof to Wheeler's wife.

It was held that Gwaltney, having obtained the land for a nominal price, upon an agreement that he would sell it, and out of the price which he might receive deduct the amount he paid for it and the sum due him, would be compelled to comply with his agreement, and it was accordingly enforced in Mrs. Wheeler's behalf.

In the case before us, it is not claimed that there was any agreement that the plaintiffs were to receive the benefit of the

purchase, by having the lien for taxes surrendered to them without compensation. It might well have been, under the circumstances, that Fred W. Munson would have been held estopped from setting up title to the land, after having purchased the tax lien on the representation that he was doing so in the interest of the plaintiffs and for their protection. But as it did not appear that he was in fact the agent of the plaintiffs, and having paid for the tax claims with his own money, he and those claiming through him were entitled to enforce it for the amount actually due.

If it had been shown, or if the plaintiffs had proposed to show, that Jones sold his claim for a sum less than the amount actually due, upon an agreement that the plaintiffs were to have the benefit of the reduced price, we think the plaintiffs might have availed themselves of the contract. The evidence offered does not go to this extent. The proposition was simply to show that Fred W. Munson represented that his wife and the plaintiffs were the owners of the land, and that he was negotiating for the tax lien in their interest, and that Jones transferred it to Stephen Munson for a sum less than was actually due him on that account. It was not proposed to show how much Jones had abated of the amount due, or that it was agreed that the plaintiffs should have the benefit of such abatement.

We recognize the doctrine to the fullest extent that one who purchases property under a representation that he is acting as the agent of another, and by that means secures a better bargain than he otherwise would, will not be permitted to profit by the fraud. The most that equity can do in such a case, however, is to decree that the purchaser shall be held to be a trustee for the person for whose benefit the purchase was made, or at the suit of the vendor set the sale aside. But it will not require the purchaser to surrender the property to the person for whose benefit it was purchased, except upon equitable terms. As there is nothing here to show that it would be inequitable to require the plaintiffs to

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pay the amount of taxes, etc., due, and which, so far as the facts show, were paid by the defendants, we think the court did not err in excluding the testimony.

It is next claimed that the court erred in computing interest at twenty-five per cent. on the amount of taxes paid by the defendants, and those under whom they claim.

The tax sale was made under the act of 1872, which provided for interest at the rate of twenty-five per cent. By sections 3 and 4 of the act of March 5th, 1883, it is provided that the rate of interest shall not be increased above twenty per cent. on the amount paid by the purchaser at tax sales and upon taxes subsequently paid, as well upon sales made under prior, as under laws then in force. The interest should have been computed at twenty per cent. instead of twenty-five per cent., thus making the aggregate taxes \$558.25, instead of \$640.

The only other error complained of is that the amount assessed for the improvements made by the defendants on the land is excessive. The defendant Fred W. Munson testified that the improvements on the land cost him over four hundred dollars. Some of the plaintiffs' witnesses put the value of the improvements at much less, but in any view of the case, whether the court allowed for the contracts for fencing, which were paid for, but not fully completed, when the suit was commenced, there was evidence tending to sustain the finding.

As it thus appears that the errors assigned are not well founded, except as to the amount of the recovery, the judgment is affirmed upon condition that the appellees shall, within twenty days herefrom, enter in the court below, as of the date of the judgment, a remittitur of the sum of eighty-one dollars and seventy-five cents. Otherwise the judgment will be reversed, with costs. It appears from the record that on the 8th day of October the appellees consented to a remittitur of the sum above mentioned, but as this consent was not unconditional, but only in the event the court should determine to

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adhere to a previous decision, the appeal must be at the costs of the appellees. Motion to retax costs sustained.

Filed Jan. 6, 1886.

No. 12,794.

MORRIS v. THE STATE.

104	457
154	8

CRIMINAL LAW.—*Continuance.*—*Temporary Postponement.*—The several statutory provisions concerning the continuance of causes have reference as well to the temporary postponement of the trial as to a continuance for the term, and when a cause is postponed until a later day in the term, it is in legal contemplation continued.

SAME.—*Matter of Right.*—*Supreme Court.*—*Practice.*—Neither a continuance for the term nor a postponement can be demanded as a matter of right, except upon cause shown; and in a criminal case where, immediately following the return of an indictment, the defendant, being in court, moves for a postponement till the following day, which motion is not supported by affidavit or other affirmative showing, the refusal of the trial court to sustain such motion will not be reviewed by the Supreme Court.

From the Perry Circuit Court.

C. H. Mason and W. Henning, for appellant.

W. A. Land, Prosecuting Attorney, and E. E. Drumb, for the State.

NIBLACK, C. J.—On the 30th day of June, 1885, the grand jury of Perry county returned an indictment against the appellant, Tobias Morris, for an assault and battery with intent to commit a rape on the person of one Mary Deorn, a girl about fourteen years old. The appellant entered a plea of not guilty to the indictment and the case was continued.

On the 4th day of November then next ensuing, the appellant withdrew his plea theretofore entered and moved to quash the indictment on account of some alleged irregularity in the organization of the grand jury which returned it.

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This motion to quash the indictment was sustained, but the grand jury of the county, being then in session, returned another indictment on the same day against the appellant for the same offence. It was about four o'clock in the afternoon when this latter indictment was returned, and the appellant, being in court upon his recognizance to answer any further indictment which might be presented against him, moved that the trial of the cause should be postponed until the next morning to allow him further time to consult counsel and to prepare for his defence, but this motion was overruled, and he was required to submit to an immediate trial, the result being a verdict of guilty as charged and a judgment of imprisonment in the State's prison for the term of two years.

Questions are made here only upon the refusal of the circuit court to postpone the trial until the following day, and upon the sufficiency of the evidence to sustain the verdict.

The several statutory provisions concerning the continuance of causes have reference as well to the temporary postponement of the trial of causes as to a continuance for the term, and when a cause is postponed, either until a later day in the same term, or until the next term, it is said to be, and is, in legal contemplation, continued. *Bicknell Crim. Pr.* 217; *Moore Crim. Law*, section 289; *Hubbard v. State*, 7 Ind. 160.

Motions to continue, as well as to postpone, are addressed to the sound discretion of the court, and neither a continuance nor a postponement can be demanded as a matter of right, except upon cause shown. *Buskirk Pr.* 224, 225; *Moore Crim. Law*, section 287.

The decision of a *nisi prius* court, upon any matter resting in its sound discretion, may be reviewed by this court, but such a decision will not be either reversed or disapproved, unless affirmatively shown to have been erroneous. *Works Indiana Pr.*, section 738; *Detro v. State*, 4 Ind. 200; *Jenks v. State*, 39 Ind. 1; *Pate v. Tait*, 72 Ind. 450.

In this case the motion to postpone the trial was not supported either by affidavit or other affirmative showing, and

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hence the presumption is that the circuit court rightly refused to postpone the trial.

The appellant testified as a witness in his own behalf. He did not deny that the prosecuting witness had been feloniously assaulted and maltreated as she claimed to have been, but based his defence upon the ground that his supposed connection with the offence was the result of a mistaken identity; that it was not he, but some other person, who had committed the offence with which he was so charged. There was evidence, nevertheless, tending very strongly to identify him as the guilty party in the assault and other violence which was committed upon the prosecuting witness.

There is consequently no sufficient reason for reversing the judgment upon the evidence.

The judgment is affirmed, with costs.

Filed Jan. 5, 1886.

No. 12,281.

HADLEY ET AL. v. MUSSELMAN.

TAXES.—Personal Property.—Redemption.—Act Repealed.—The act of March 13th, 1875, providing for the redemption of personal property sold for taxes, was repealed by the act of March 29th, 1881, concerning taxation, which makes no provision for redemption from such sales.

SAME.—Bailment.—Purchase at Tax Sale of Bailed Property by Bailee.—A bailee for hire, in possession, who is under no contract or duty to pay the taxes on the property bailed, may buy the same at a sale for taxes.

SAME.—Sale on Christmas Day Valid.—A sale of property for taxes made on Christmas day is valid.

From the Johnson Circuit Court.

W. H. Ripley, for appellants.

J. L. White and W. J. Buckingham, for appellee.

ELLIOTT, J.—The material allegations of the appellants'

104	459
139	249
139	429

104	459
170	327
170	491

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complaint are these: The appellants were partners, in February, 1883, doing business in Marion county, and in that month bought a saw-mill of A. H. Dutton; this mill was situated in Brown county; prior to the purchase Dutton had leased the mill to one Reese, who had sub-leased it to Musselman, the appellee. The original lease was executed on the second day of March, 1882, and the first year expired in March, 1883. In February, 1883, the appellants attempted to take possession of the mill, but they were resisted by the appellee, who claimed the right to hold it until March, 1884, and appellants were compelled to yield to his claim. They had no knowledge of the existence of the lease until after their purchase from Dutton. Before the expiration of the lease, December 25th, 1884, the mill was, without the knowledge of the appellants, sold for taxes. The mill is alleged to be personal property, and to be of the value of one thousand dollars. The appellee, then in possession of the mill, purchased it for eighty-one dollars, and claims to hold it as a purchaser. Within thirty days after the sale the appellants tendered him ninety-eight dollars, which was the amount of his bid with penalty and charges added. The tender was refused on the ground that the law did not permit a redemption of personal property sold for taxes.

We have followed the language of counsel in giving a summary of the complaint, although we think the terms "lease," "sub-lease," and the like, are not properly used, since they, in strictness, refer only to the demise of real estate. If the mill is personal property the party in possession is a bailee for hire, and not a lessee.

The first question argued is thus stated by counsel: Is the act of March 13th, 1875, entitled "An act to provide for the redemption of personal property sold for taxes," still in force? Settled rules require us to decide this question against the appellants. The act of March 29th, 1881, entitled "An act concerning taxation," covers the entire subject of taxation, embracing sales for taxes and redemptions from such sales, and

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repeals all prior acts upon the subject. The act of 1881 contains full and explicit provisions respecting the sale of personal property, but makes no provision for redemption from such sales. The case is, therefore, within the rule that where a new statute covers the whole subject-matter of an old one, adds new provisions and makes changes, former laws upon the same subject are repealed. *President Peru, etc., R. R. Co. v. Bradshaw*, 6 Ind. 146; *Longlois v. Longlois*, 48 Ind. 60; *Wagoner v. State*, 90 Ind. 504, and auth. cited p. 507. There is, however, more than a repeal by implication, for in the act of March 29th, 1881, it is provided that "All laws and parts of laws within the purview of this act are hereby repealed, except 'an act to levy an annual tax for the purpose of raising revenue,' approved March 3, 1877."

The second question presented by the record is thus stated by the appellants' counsel:

"2. Can a tenant or bailee of personal property, residing and holding such property in a county in this State other than the county of which the owners are residents, acquire an absolute valid title to such property adverse to the owners through a sale by the county treasurer of the property to satisfy the taxes assessed against such property, the taxes having been assessed and the sale had during the term of tenancy or bailment, the owners having no notice or knowledge of the sale?"

The authorities are against the appellants upon the question of the right of a lessee or bailee in possession to buy property at a sale for taxes. Where the person who buys is under a contract or duty to pay the taxes he can not become a purchaser, but where there is no contract and no duty he may buy. *Garwood v. Hastings*, 38 Cal. 216; *McMinn v. Whelan*, 27 Cal. 300; *Bowman v. Cockrill*, 6 Kan. 311; *Nellis v. Lathrop*, 22 Wend. 121; *Sharpe v. Kelley*, 5 Denio, 431; *Buckley v. Taggart*, 62 Ind. 236, see pp. 238, 239; 2 *Desty Taxation*, 938. This rule denies to a mortgagor, and to one

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in possession claiming title, a right to buy, but does not deny it to a bailee for hire. *Cooper v. Jackson*, 99 Ind. 566.

The case of *Bender v. Stewart*, 75 Ind. 88, is not in point. The ruling there applies to one in possession as a tenant in common, but it does not apply to one in possession under a lease or contract of bailment for hire. There is a well defined distinction between the two classes of cases, and the rule in the one class does not govern in the other.

The third question is this: Is a sale for taxes made on Christmas day valid? Our statute makes Christmas a holiday in one respect, and in one only, and that is in regard to commercial paper, and we can find no rule of our common law making it a legal holiday as to any other matter. It was made a holiday, or, as it was called, a holy day, by a statute of Edward VI., but this statute was abrogated by Queen Mary. It was, however, revived during the reigns of Queen Elizabeth and King James I. The statute created numerous holidays, but they were reduced by a statute of William IV. to Sunday, Easter Monday, Easter Tuesday and Christmas day. There are, it is said, two kinds of holidays, ecclesiastical and state; the former established by the church, the latter by the state. In this country we can not recognize the ecclesiastical holidays, for we have no established church, and affairs of state are carefully separated from ecclesiastical matters. The statute of William IV. is not part of our law, and the statutes of Queen Elizabeth and King James I., although enacted prior to the fourth year of the reign of that King, can not be considered as part of the body of the law which governs us, because those statutes are so blended and connected with ecclesiastical matters as to be inconsistent with the State and Federal constitutions. It has been held that, at common law, ministerial, but not judicial acts, might be lawfully performed on Sunday in the absence of a prohibitory statute. *Cory v. Silcox*, 5 Ind. 370; *Kiger v. Coats*, 18 Ind. 153.

If Sunday can not be considered as a holiday in the ab-

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sence of a statute so declaring, it is quite clear that Christmas can not be. That it has not been so regarded is evident from the fact that it was found necessary to enact a statute making it a holiday in regard to commercial paper.

As there is neither a statute nor a rule of the common law prohibiting the sale of property for taxes on Christmas day, we can not hold that a sale made on that day is void, however much we may doubt the wisdom and propriety of making sales on that day.

Judgment affirmed.

Filed Oct. 30, 1885; petition for a rehearing overruled March 12, 1886.

No. 12,105.

**FRESHOUR ET AL. v. THE LOGANSPORT AND NORTHERN
TURNPIKE COMPANY ET AL.**

HIGHWAY.—*Appeal from County Commissioners.*—*Dismissal.*—An appeal to the circuit court will not lie from an order of the county commissioners appointing viewers to report upon the public utility of a proposed highway, and when taken it should be dismissed summarily.

SAME.—*Jurisdiction.*—A proceeding for the location of a highway remains under the jurisdiction of the county commissioners until by some order or decision it is substantially ended.

PRACTICE.—*Dismissal of Appeal.*—*Bill of Exceptions.*—It is only where a motion to dismiss an appeal rests upon matters not apparent on the face of the record itself that a bill of exceptions is necessary to present it.

From the Cass Circuit Court.

S. T. McConnell and *D. B. McConnell*, for appellants.

D. C. Justice, for appellees.

MITCHELL, J.—On the 13th day of September, 1881, George Freshour and thirty-five others, alleging that they were resident freeholders and householders of Cass county, residing in the vicinity of a proposed highway, filed their pe-

104	463
125	171
104	463
124	701
125	350
104	463
141	110
143	179
104	463
148	149
104	463
165	491

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tion with the board of commissioners of Cass county praying for the location of a highway on a line described.

On the same day the Logansport and Northern Turnpike Company, and the Logansport and Pleasant Grove Turnpike Company appeared before the board and moved to dismiss the petition for certain causes assigned in writing. The motion to dismiss was overruled.

The turnpike companies then filed their remonstrance or "answer" to the petition. The substance of the answer was, that on the 3d day of December, 1877, Freshour and others filed their petition before the same board praying for the location of a highway along the identical route described in the petition then presented. That such proceedings were had thereon, that on the 12th day of March, 1879, a report of viewers was presented to the board by which damages, amounting in the aggregate to over five hundred dollars, were awarded to certain persons whose lands would be affected by the location of such highway. That the board, not deeming the proposed highway of sufficient public utility to justify the payment of the damages awarded out of the public treasury, made an order that when the damages were paid by the petitioners the proposed highway should be established and opened.

The board held this remonstrance insufficient, and thereupon made an order appointing viewers to view and report upon the utility of the proposed highway.

The turnpike companies appealed from this order to the circuit court. The record shows that at the November term, 1882, of the Cass Circuit Court, the plaintiffs' motion to dismiss the appeal was overruled, to which ruling they excepted, and five days' time was given them in which to file a bill of exceptions.

The record does not disclose, except as it may be inferred from the foregoing recital, that a motion to dismiss the appeal was filed.

After the motion to dismiss was overruled, the remonstrants, by leave of court, filed additional answers, present-

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ing various matters in bar of the right of the petitioners to continue the prosecution of their petition.

The principal grounds set up to defeat the petition were, that the petition omitted the name of a land-owner whose lands would be affected by the location of the highway. The proceedings and assessment of damages referred to in the remonstrance filed before the board of commissioners were also pleaded in bar.

Upon issues made on the answers thus filed a trial was had in the circuit court, finding for the defendants, and, over a motion for a new trial and in arrest, a general judgment was entered against the petitioners that they take nothing by their petition.

It is made a question whether the circuit court acquired jurisdiction by the appeal as taken. The appointment of viewers by the board upon the application of the petitioners being a mere interlocutory order, made in the course of a proceeding which had not progressed to final judgment, the question is, did an appeal lie from such order?

Preliminary to the decision of this question, we are required to determine whether the motion to dismiss the appeal is so presented as that the question is before us. The contention is made that because the motion to dismiss, and the reasons upon which it was made, are not in the record by bill of exceptions, no question is presented in that regard. It is only when such motion relates to a collateral matter, that is, a matter not apparent on the face of the record itself, that a bill of exceptions is necessary to present it.

The jurisdiction of the circuit court depended upon whether the order appointing viewers was one from which an appeal would lie. If an appeal could properly have been taken, the court had jurisdiction. If it could not be taken, the court had no jurisdiction. All the facts necessary to determine the question were in the record, and "Where full information and all essential facts are shown in the record, no bill of excep-

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tions is necessary." *Doctor v. Hartman*, 74 Ind. 221; *Redinbo v. Fretz*, 99 Ind. 458. If, in fact, the court had no jurisdiction to proceed, a formal motion to dismiss was not necessary. The court should have dismissed the case summarily. In the case of *Washington Ice Co. v. Lay*, 103 Ind. 48, which is relied on by the appellees, a motion to dismiss was made for want of sufficient notice of the filing of the petition. The motion related to a collateral matter, in no manner involving the jurisdiction of the court, and it was correctly held that a bill of exceptions was necessary to present the question. The case is not applicable to the question as presented here. The order of the board from which the appeal was taken was not such a decision as that an appeal could be taken from it.

The case before us is, in many respects, similar to that of *Logan v. Kiser*, 25 Ind. 393. In that case a petition was presented to the board of commissioners praying for the establishment of a highway. Logan appeared and filed what he called an answer in bar, in which he set up that an effort had been made by other petitioners, some ten years before, to obtain the location of the highway then prayed for, and that the proceedings had never been prosecuted to a conclusion. This answer was held insufficient. Before any final action by the board, Logan appealed to the circuit court. It is said in that case, the "court ought summarily to have dismissed the appeal." So in this case, until an order was made by the board of commissioners putting an end to the proceeding before it, in some way, there was no decision from which an appeal could be taken. *Smith v. Searce*, 34 Ind. 285.

If it were allowable to appeal from every order which a board of commissioners is required to make during the progress of a proceeding for the location of a highway, and thus arrest it, the establishing of a highway might be delayed indefinitely.

A proceeding for the location of a highway remains within,

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and subject to, the jurisdiction of the board of commissioners, until by some order or decision made by such board the proceeding is substantially ended. Where such a decision is made, an appeal may be taken by any person considering himself aggrieved. Upon such appeal the circuit court acquires jurisdiction to try the case *de novo* and determine all such questions and issues as have been made before the board, or which may be made by proper amendment in the court to which the appeal is taken. *Green v. Elliott*, 86 Ind. 53; *Turley v. Oldham*, 68 Ind. 114.

The court erred in overruling the motion to dismiss the appeal. The judgment is reversed with costs, with directions to the court below to dismiss the appeal.

Filed Jan. 7, 1886.

No. 12,216.

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CRIMINAL LAW.—Indictment.—Venue.—An indictment which alleges the commission of a crime in a certain county, but which does not name the State in the body thereof, sufficiently lays the venue if the State is named in the caption and upper marginal title, which are a preliminary part of the indictment.

SAME.—Rape.—Instruction.—Theory and Testimony of Defendant.—Where, in a trial on an indictment for rape, the defendant testifies that the act of intercourse took place, but with the consent of the prosecuting witness, he thereby commits himself to that line of defence, and the court in instructing the jury may assume that such act of intercourse occurred.

SAME.—Moral Character and Reputation for Chastity of Prosecuting Witness.—For instructions on this subject see opinion.

SAME.—Attempted Escape of Defendant.—An instruction to the effect that if the defendant, while in the custody of the sheriff, attempted to escape from such custody, this would be a circumstance to be considered by the jury in connection with all the other evidence, to aid them in determining the question of guilt or innocence, is proper, there being evidence tending to prove such attempt.

SAME.—Testimony of Defendant.—Credibility of Witnesses.—An instruction to

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126	186
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134	654
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136	671
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139	537
104	467
140	864
104	467
144	19
144	257
147	220
104	467
151	386
104	467
153	565
104	467
156	44
104	467
164	269
104	467
166	185
104	467
168	623

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the effect that the defendant's testimony should be weighed as that of any other witness, and that his interest, his manner, and the probability or improbability of his testimony should be considered, with all the other circumstances, states the law correctly.

SAME.—Presumption of Innocence.—Reasonable Doubt.—An instruction that "the rule of law which throws around the defendant the presumption of innocence, and requires the State to establish beyond a reasonable doubt every material fact averred in the indictment, is not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law, which is intended for the protection of the innocent, and to guard so far as human agencies can against the conviction of those unjustly accused of crime," is not erroneous.

SAME.—Instruction.—In a trial on an indictment for rape, where the act of intercourse is admitted by the defendant in his testimony, the failure of the court to instruct the jury that they may find the defendant guilty of assault and battery, or assault and battery with intent to commit a rape, is not error.

SAME.—Rape.—Degree of Resistance Required of Prosecuting Witness.—In a prosecution for rape it is incumbent on the State to show that the prosecuting witness had resisted with all the means within her power, but the nature and extent of resistance which ought to be reasonably expected in each particular case depends upon the peculiar circumstances attending it.

SAME.—Misconduct of Prosecuting Attorney in Opening Statement.—Practice.—While the use of opprobrious epithets toward the defendant by the prosecuting attorney in his opening statement is such a breach of professional decorum as would justify the trial court in restraining him, yet it is not of sufficient importance to justify the Supreme Court in a reversal of the judgment.

SAME.—Right of Jury to Determine the Law.—While in a criminal case the jury may determine the law for themselves, they are not, strictly speaking, the sole judges of the law of the case, neither may they disregard the law; and an instruction which informed the jury that, "even if all the facts alleged in the indictment are established beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offence under the laws of the State, and if you determine that they do not, you have the right to acquit the defendant," was properly refused as implying an unnecessarily extreme construction of the constitutional right of a jury in a criminal case.

From the Noble Circuit Court.

H. G. Zimmerman, F. Prickett, L. H. Wrigley and S. M. Hench, for appellant.

F. T. Hord, Attorney General, H. C. Peterson and R. P. Barr, for the State.

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NIBLACK, C. J.—This was a criminal prosecution based upon the following indictment:

“STATE OF INDIANA, NOBLE COUNTY, ss.

“In the Noble Circuit Court, of the June term, 1884.

“STATE OF INDIANA v. JOHN ANDERSON. Indictment.

“The grand jury of the county of Noble, upon their oath, do present that John Anderson, on the 18th day of June, 1884, at the county of Noble, in and upon one Josephine Fielding, a woman, did forcibly and feloniously make an assault, and her, the said Josephine Fielding, then and there, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

Anderson, the defendant below and the appellant here, moved to quash the indictment, upon the ground that it was not charged with sufficient certainty that the crime was committed in Noble county, in this State. The circuit court nevertheless overruled the motion to quash the indictment, and a trial, which ensued, resulted in the jury finding the appellant guilty as charged, and in a judgment that he be imprisoned in the State's prison for the term of five years. Numerous questions were reserved upon the proceedings below.

While the indictment was not as full, formal and explicit as the old forms required, and as it might easily have been made, it was, notwithstanding, a substantially good indictment under our present criminal code, which, for many purposes at least, makes the caption and upper marginal title a preliminary part of an indictment. R. S. 1881, sections 1732, 1733; Moore Crim. Law, sections 165, 166; 1 Bishop Crim. Proc., section 377. See, also, section 1756, R. S. 1881.

The plain, and indeed only fair inference from the indictment, considered with reference to all its parts, was that the county of Noble, in which the offence was charged to have

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been committed, was the county of that name situate within and constituting a part of this State.

The, prosecuting witness testified that the appellant had sexual intercourse with her twice while she was alone with him in the woods near Rome City, on the day named in the indictment, and that on both occasions the intercourse was forcible and against her will. The appellant, who became a witness in his own behalf, admitted the acts of sexual intercourse testified to by the prosecuting witness, at the times and places indicated by her, but, in extenuation, claimed, and very positively asserted, that both acts of intercourse were with her full and free consent.

As applicable to the issue thus made by the evidence, the court instructed the jury as follows:

"If you find from the evidence in this case that an act of sexual intercourse did take place between the defendant and the prosecuting witness, as averred in the indictment, the question as to whether or not the prosecuting witness voluntarily consented to such act is a question of fact for you to determine from the evidence in the case.

"The defendant insists that she did thus voluntarily consent thereto, and that he used no force or coercion of any kind to compel such consent, but that she yielded to his desires upon his request alone.

"While the prosecution insists that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and that if she finally submitted to her fate it was against her will and for fear of more serious consequences.

"You are to say from the evidence which, if either, is right. And if, after giving due weight to all the evidence, you find the prosecuting witness did, voluntarily, consent to such act of intercourse, and not under coercion, you should acquit; but if you find, beyond a reasonable doubt, that the act was by force, and against her will, and find the other facts

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averred in the indictment established beyond a reasonable doubt, you should convict."

The appellant assails this instruction for the alleged reason that it injuriously restricted him to a single theory in his defence, since he had the right, up to the last moment, to elect upon what ground he would base his defence. When the trial began the appellant had an election as to the ground upon which he would rest his defence. Having, however, elected to take the stand as a witness and to admit all the material matters charged against him, except the alleged forcible and felonious character of the sexual intercourse, he thereby committed himself to a single theory in his defence, for the obvious reason that by his admissions, he had rendered any and every other line of defence unavailable. The instruction in question was not, therefore, open to the objection urged against it. The court also instructed the jury as follows:

"Evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputation for chastity and virtue. You are not to understand from this that a rape can not be committed on a woman of bad moral character. A woman may be a common prostitute and may still be the victim of a rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste. So that whatever conviction this evidence may produce in your minds as to whether she is of good or bad moral character, or as to whether she is chaste or unchaste, you will treat it as a circumstance affecting her credibility to aid you in determining whether her story is

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true or false, and the act of intercourse voluntary or against her will."

There was evidence to which this instruction was applicable, and, in the connection in which it was given, it stated the law aptly and appropriately.

The court further instructed the jury in these words:

"Evidence has been introduced as to an attempted escape from jail by the defendant while in the custody of the sheriff of this county on this charge. If you find from the evidence that defendant did thus attempt to escape from custody, this is a circumstance to be considered by you in connection with all the other evidence to aid you in determining the question of his guilt or innocence."

There was evidence tending to prove that within a short time after the 18th day of June, 1884, the appellant was committed to the common jail of Noble county upon the charge contained in the indictment in this case, and that, not long after he was so committed, he made a vigorous and nearly successful effort to escape from that jail. That effort to escape constituted a circumstance which the jury were authorized to consider in connection with the other evidence in the cause, and, in that view, we see no error in the instruction given in relation to it as above. Whart. Crim. Ev., section 750.

The court still further instructed the jury that, "In determining the weight to be given the testimony of the different witnesses you should take into account the interest or want of interest they have in the case, their manner on the stand, the probability or improbability of their testimony with all other circumstances before you, which can aid you in weighing their testimony. The defendant has testified as a witness, and you should weigh his testimony as you weigh that of any other witness. Consider his interest in the result of the case, his manner and the probability or improbability of his testimony."

This instruction also appears to us to have stated the law

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correctly on the general subject of the credibility of witnesses, and was pertinent to much of the evidence which the jury had to consider in making up their verdict. *Nelson v. Vorce*, 55 Ind. 455; *Canada v. Curry*, 73 Ind. 246; *Fisher v. State*, 77 Ind. 42; *Woollen v. Whitacre*, 91 Ind. 502; *Dodd v. Moore*, 91 Ind. 522; *Overton v. Rogers*, 99 Ind. 595.

In addition to the foregoing instructions and many others upon which no question is made here, the court told the jury that, "The rule of law which throws around the defendant the presumption of innocence and requires the State to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty, from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime." Objections are made to this instruction, but no question is made upon it which we feel called upon to specially notice. It is nothing more than a substantial repetition of what has heretofore, in some form, received the approbation of this court, and notably so in the recent case of *Stout v. State*, 90 Ind. 1; see, also, *Turner v. State*, 102 Ind. 425. By an instruction known as No. 4, the court told the jury that an indictment for rape involved also a charge of an assault and battery, and that if the evidence warranted such a conclusion, the appellant might be acquitted of the charge of rape, and found guilty of an assault and battery only. By a further instruction, known as No. 14, the court submitted to the jury a form for their verdict in case they should find the defendant guilty of rape as charged; also gave to the jury a form for a verdict in the event that they might find the defendant guilty of an assault and battery only. It is contended that both of these instructions were injurious to the appellant, since they both failed to inform the jury that, under the indictment, he might have been found guilty of an assault and battery with *intent* to commit

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a rape. But, as has been seen, there was nothing in the evidence tending to make out either a case of assault and battery only, or of assault and battery with intent to commit a rape. The sexual intercourse complained of having been admitted by the appellant, only one question remained, and that was, whether it took place under circumstances which constituted it a rape, or only an ordinary case of fornication or adultery. The circuit court might, therefore, have well omitted to instruct the jury that the appellant could, under the indictment, be found guilty of an assault and battery only, and for the same reason there was no error in the failure of that court to tell the jury that upon an indictment for rape the defendant might be convicted of an assault and battery with *intent* to commit a rape.

The appellant asked the court to instruct the jury in effect that a woman, assaulted with the intent to commit a rape upon her, is expected to bite, if she has teeth, to kick, if she has limbs, to scream if she has a mouth, and to generally resist by all other violent means within her power, but the court refused to so instruct the jury. The court had already instructed the jury that it was incumbent upon the State to show that the prosecuting witness had resisted with all the means within her power, and that was as far as the court was required to go under our decided cases, and others of recognized authority in this State. The nature and extent of resistance which ought reasonably to be expected in each particular case, must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance. *Ledley v. State*, 4 Ind. 580; *Pomeroy v. State*, 94 Ind. 96 (48 Am. R. 146); *Commonwealth v. McDonald*, 110 Mass. 405; 2 Bishop Crim. Law, section 1122.

One David B. Anderson was called as a witness for the defence. He testified to having, in company with others, had a conversation with the prosecuting witness, on the 21st day

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of June, 1884, concerning the alleged outrage upon her by the appellant and to a good many things which the prosecuting witness said on that occasion. Counsel for the appellant then asked the witness if Mrs. Fielding did not say in that conversation that she would not have cared so much if the appellant had taken her to any kind of a decent place, but upon objection being made the court overruled the question, and would not permit it to be answered, and upon that ruling a question was reserved at the time it was made. The record does not disclose the ground upon which that ruling was made, but it was presumably upon the idea that the question excluded was too leading in its character, since immediately following, in response to a more general question, the witness stated that Mrs. Fielding said she would not have cared if the appellant had taken her to a decent place. We see no error in the exclusion of the question first propounded as above because of its leading form, but conceding the ruling upon it to have been erroneous, the error was cured by the proceedings which immediately ensued.

In his opening statement to the jury the prosecuting attorney said that the appellant was a "dirty dog," and that in separating the prosecuting witness from her companions he acted "like a dirty dog as he was," and it is argued that the using of such epithets in a mere opening statement constituted such misconduct on the part of the prosecuting attorney as requires a reversal of the judgment.

It was, strictly speaking, a breach of professional decorum to apply opprobrious epithets to the appellant in advance of the introduction of any evidence from which disparaging inferences might have been drawn, and the circuit court would have been justified in restraining the prosecuting attorney from the use of such epithets in a merely opening statement; but the breach of professional decorum thus involved ought not to be regarded as of sufficient importance to cause a reversal of the judgment. *Bessette v. State*, 101 Ind. 85; *Epps v. State*, 102 Ind. 539.

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The record in this cause is comparatively a very voluminous one, much more so, it seems to us, than was necessary to have been made in such a cause, and, for that reason, some of the minor matters to which our attention has been called in argument may have escaped us in our examination of the record; but, so far as we have been able to observe, all the legal propositions necessary for the information of the jury were fairly, and with substantial accuracy, embraced within the instructions given by the court upon its own motion; consequently, no cause has been shown for a reversal of the judgment either on account of instructions given or instructions refused.

It is finally claimed that the verdict was not sustained by the evidence in some material respects, and that for that reason, if for no other, the judgment ought to be reversed. There were some weak points in the evidence, and on that account there is room for grave apprehension that the jury may have made a mistake in the conclusion at which they arrived, but there was evidence tending, in some degree, to sustain all the material averments contained in the indictment, and, under such circumstances, we ought not to reverse the judgment upon the evidence.

The judgment is affirmed, with costs.

Filed Dec. 31, 1885.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The appellant complains that the circuit court erred in modifying instruction No. 6, and in refusing to give instruction No. 8, asked by him respectively at the trial, and that we failed to consider the questions arising upon those instructions at the former hearing of this appeal. This failure on our part was a mere inadvertence, resulting from the voluminous character of the record, as well as of the brief filed on behalf of the appellant.

Instruction No. 8, asked as above, was as follows: "In this case you are the sole judges of the law, and your right

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to determine the law of the case for yourselves, goes to this extent that, even if all the facts alleged in the indictment are established by the evidence beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offence under the laws of this state, and if you determine that they do not, you have the right to acquit the defendant. You are not bound by the instructions given by the court as to the law, but are at liberty to disregard such instructions if you see fit to do so, and determine the law for yourselves."

This instruction invoked, in any event, a too extreme construction of section 19 of the Bill of Rights which declares that, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." This provision evidently means that the jury have the right to determine all questions of law applicable to such matters as they are required to consider in making up their verdict, but can not be rightfully construed to mean that the jury are the sole judges of the law in every respect in a criminal cause. The court judges of the sufficiency of an indictment under the law. It decides all questions of law arising upon the admissibility of evidence, and has the power to grant a new trial when the jury have erroneously determined the law injuriously to the defendant. The judge, too, is required to instruct the jury upon all matters of law necessary for their information in the rendition of a verdict in a criminal cause. Thus instructing the jury involves, in a qualified sense at least, the exercise of a judgment upon all matters of law concerning which the judge must give information to the jury.

The jury are, consequently, not, strictly speaking, the *sole* judges of the law in all its relations to a criminal case. Then, too, the instruction in question came too near carrying with it the intimation that the jury have the right in their mere discretion to disregard all law in reaching a verdict in a criminal prosecution. This they have the *power* to do in many cases, but have no legal or moral *right* to do under the Con-

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stitution, or otherwise. The kind of right, referred to in the Bill of Rights is defined by Webster in his dictionary to be a "privilege or immunity granted by authority." In a more comprehensive sense it may be said to be "a privilege or immunity recognized or conferred by competent authority." It is the duty of the jury to avail themselves of all the opportunities which may be afforded them to ascertain what the law governing the case before them is, and it is their right, after hearing all that may be properly said on the subject, to determine what the law in that respect ought to be held to be, and to decide accordingly, but this does not place the jury above the law, or confer upon them the lawful right to decide simply as they "see fit," regardless of all law, as it has been recognized or established by the proper tribunals. The judgment in the case of *Hudelson v. State*, 94 Ind. 426 (48 Am. R. 171), was reversed because one of the instructions given in the cause was esteemed to have been too mandatory in its structure, and hence to have trenched too much upon the province of the jury. The doctrine of that case does not sustain the instruction refused in this case in all of its essential features, as claimed by counsel, and we think that case carries the right of the jury to determine the law in a criminal case to its extreme limit, in a practical point of view. We are, therefore, of the opinion that the circuit court did not err in refusing to give instruction No. 8 hereinabove set out.

The concluding part of instruction No. 6, asked by the appellant and given in a modified form, contained a more condensed, but substantially similar, statement of the law, to that embraced in instruction No. 8, except that it did not assert that the jury were the sole judges of the law in a criminal case, and the modification complained of consisted in the striking out the concluding part of the instruction.

The fifth clause of section 1823, R. S. 1881, after providing that the judge shall in a criminal case state to the jury all the matters of law necessary for their information, concludes as follows: "If he present the facts of the case, he

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must inform the jury that they are the exclusive judges of all questions of fact, and that they have a right also to determine the law."

Instruction No. 5, given to the jury by the circuit court upon its own motion, in this case was in these words: "You are exclusive judges of all questions of fact, and you have the right, also, to determine the law."

This instruction was a substantial affirmation of the Bill of Rights as well as a sufficient compliance with the provision of the statute lastly above set out on the subjects to which it related, and while the circuit court might, in its discretion, have given further and more elaborate instructions on either one or both of these subjects, it was not error to refuse to do so, and it was better, perhaps, not to attempt to do so.

Other grounds are suggested as reasons for a rehearing, but these suggestions relate to questions which were considered with care at the former hearing, and upon which we regard it as unnecessary to enter into a formal review.

The petition for a rehearing is overruled.

ZOLLARS, J., was absent.

Filed March 13, 1886.

No. 12,226.

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REAL ESTATE.—Deed.—Trust and Trustee.—Special Finding.—Presumption.

—A special finding, that the land in controversy was conveyed to the cashier of a bank personally, by an absolute deed of general warranty; that in the transaction a promissory note held by the bank against the grantor was paid off and surrendered; that such conveyance was fully known to the other officers of the bank at the time; that neither the bank, during its existence, nor its officers or stockholders, asserted any claim to, or interest in, such land for more than twenty-five years, nor until after the commencement of this suit; that though such grantee

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ceased to be cashier of the bank shortly after such conveyance, "there was no such account as a real estate account in the books of the bank," and that the plaintiffs, who were the heirs of the grantee, knew nothing of such conveyance until 1881, fails to show that the grantee took or held the land in trust for the bank, and, in the absence of any fact to the contrary, the presumption is that he paid for the land with his own personal means.

SPECIAL FINDING.—*Must Show Interest of Party to Action.*—Where a special finding fails to show that a party, either personally or in a representative capacity, has any interest in the subject of the action, such party can not complain of alleged errors in the conclusions of law.

From the Huntington Circuit Court.

T. Roche, L. P. Milligan and O. W. Whitlock, for appellants.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellees.

HOWK, J.—This was a suit by the appellees, Cecelia Keller and James F. Welden, as sole plaintiffs, to quiet their title to certain real estate, particularly described, in Huntington county. The appellants Hedges and Carpenter were the only defendants named in appellees' complaint, at the commencement of their suit, but as the cause progressed, in the trial court, other persons were made parties thereto. The cause was put at issue and tried by the court, and, at the request of the parties, the court made a special finding of facts, and thereon stated, as its conclusions of law, that the title to the real estate in controversy ought to be quieted in the appellees. Over the exceptions of George F. Carpenter, administrator of the estate of Solomon Lewis, deceased, to the court's conclusions of law, the court in accordance therewith rendered a judgment and decree quieting the appellees' title to the real estate described in their complaint.

In this court, the only error properly assigned by the appellant Carpenter, administrator, etc., calls in question the correctness of the trial court's conclusions of law upon its special finding of facts.

The facts found by the circuit court were, in substance, as follows:

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1. In July, 1854, James Welden, Solomon Lewis, James R. Welden, Charles Hedges, H. Colby, D. W. Anderson, C. F. Sherman, George Quinby, Benjamin Orton, Samuel Moore, S. H. Purviance and John Roche, associated themselves together by articles of association, under the general law of Indiana, for the purpose of doing an exchange and banking business in the town of Huntington, Indiana, under the name of the Huntington County Bank, with a capital of \$300,000, the capital stock of which was owned and held by said persons as follows, to wit: James Welden and Solomon Lewis, each \$75,000; J. R. Welden, Charles Hedges, H. Colby, D. W. Anderson and C. F. Sherman, each \$25,000; George Quinby, \$15,000, and S. H. Purviance, Samuel Moore, John Roche and Benjamin Orton, each \$2,000.

Such stock was to be held and owned by said stockholders in the above proportions, and they were each to pay four per cent. of said stock forthwith in funds equivalent to New York City funds, and further amounts as they each and all might thereafter determine; and no member should sell or hypothecate his said stock to any person or corporation until after an offer to, and refusal to purchase by, the parties; neither of the parties to such articles of association to loan or use any of the assets of such bank to his own private use or purposes, directly or indirectly, to an amount exceeding \$5,000. Said association could be dissolved and the business of such bank closed at any time, by the majority of the stock; but, in that case, the minority could continue the business of such bank by paying the fair cash value of the interest therein of the majority, and giving them proper and full indemnity. The president, cashier and directors were to be appointed by the stockholders, who were to vote in proportion to their stock.

2. Four per cent. of the stock of such bank was paid by the stockholders.

3. No person or officer was named in the articles of asso-

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ciation as the person or officer who should take the title to any lands the association might purchase or take in payment of debts due or otherwise.

4. John Roche was president and James R. Welden cashier of such association or bank, and its business was managed by such president and cashier, with the advice of James Welden, a stockholder.

5. There were no other active officers in the business of such bank but its president and cashier.

6. In May, 1855, Henry Brown and James M. Bratton were indebted to such bank in the sum of \$500, upon a note payable to the bank, on which note Bratton was surety for Brown. Neither Bratton nor Brown had cash to meet its payment. Brown then owned the land described in the complaint, and, to indemnify Bratton as such surety, Brown conveyed such land to Bratton. James R. Welden, the cashier of the bank, took such land and turned the note over to Bratton and paid Bratton in addition to the note either \$250 or \$300, which money Bratton paid to Brown. Bratton conveyed the land to James R. Welden by deed, and Welden took the land and the deed therefor, by the direction of John Roche, president of such bank. The transaction between Bratton and James R. Welden was in such bank. The deed from Bratton was made to James R. Welden instead of to John Roche, because Welden was cashier of such bank.

7. In August, 1855, James R. Welden resigned the office of cashier of such bank, and returned to Mansfield, Ohio, and, in December following, died intestate, leaving surviving him as his only heirs at law the plaintiffs in this suit, who were his widow and only son.

8. Plaintiffs knew nothing of such land, or of the conveyance thereof to James R. Welden, and did nothing in relation to such land until in 1881.

9. John Roche took possession of such land and kept the same under his control from the time James R. Welden returned to Mansfield, Ohio, until 1881, renting it to different

persons, receiving the rents and paying the taxes, except that, in 1867, he suffered the taxes to become delinquent thereon, and when such land was offered for sale for such delinquent taxes he bid such land in for such taxes, and took out a deed on such sale in 1881, and soon after conveyed such land by quitclaim deed to the plaintiffs.

10. At the time the taxes, named in finding No. 9 herein, accrued, James R. Welden had no personal property in Huntington county, Indiana, out of which such taxes could have been collected, and had not had any such property in such county since that time. The facts in this finding found, and the tax deed found in finding No. 9, were all the evidence offered or received tending to support such tax deed.

11. John Roche claimed to hold such land for the true owners thereof, during the whole time he held the same. He also knew of the death of James R. Welden, and that such decedent's family resided in Mansfield, Ohio, but did not communicate with them.

12. The books of such association or bank, except the stock-book and register of collections, are lost or destroyed.

13. Thomas Roche succeeded James R. Welden as cashier of such bank, in August, 1855, and continued as cashier thereof until January, 1857. There was no such account as a real estate account in the books of such bank.

14. Such association or bank ceased to be a banking corporation on the 1st day of January, 1857, by operation of law, it not having complied with the statute in that behalf, then in force.

Upon the foregoing facts, the trial court stated the following conclusions of law:

1. The association, found in finding No. 1, was a valid and legal association, for the purposes therein set out and found.

2. The conveyance of the real estate in controversy herein to James R. Welden, either by its own effect or by its effect taken in connection with all the facts herein found, did not

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create a trust, either express or implied, in James R. Welden, in such real estate.

3. The fee simple of the real estate in controversy, described in the pleadings herein, is in the plaintiffs, free from any trust, either express or implied.

4. The tax deed to John Roche, found in finding No. 9, was invalid to convey to him the real estate in controversy.

5. The title to the real estate, described in the pleadings herein, ought to be quieted in the plaintiffs, Cecelia Keller and James F. Welden.

As the appellant has presented this case here, solely upon his exceptions to the trial court's conclusions of law, he admits that the facts of the case were fully and correctly found by the court, but says that the court has erred in its application of the law to the facts so found in its conclusions of law. The only question, therefore, we are required to consider and decide, in this cause, may be thus stated: Upon the facts specially found by the court, is there any error, in its conclusions of law, which injured or harmed the appellant, or of which he can be heard to complain? *Fairbanks v. Meyers*, 98 Ind. 92; *Shoemaker v. Smith*, 100 Ind. 40; *Helms v. Wagner*, 102 Ind. 385.

The question stated must, we think, be answered in the negative. Even if it were conceded that James R. Welden, as whose heirs the appellees claimed title to the land in controversy, upon the facts found by the court, took and held the title to such land as the trustee of the Huntington County Bank, yet it was not found by the court as a fact that the appellant Carpenter, either personally or in his representative character, had any interest whatever in the trust estate. If, therefore, the court erred in its conclusion of law, that the fee simple of the land in controversy was in the appellees, "free from any trust, express or implied," it is difficult to see wherein or how the appellant, upon the facts found by the court, was injured or harmed by such error. It is true, the court found as a fact that one Solomon Lewis was an

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original stockholder of the Huntington County Bank, but the court failed to find that Lewis was such stockholder when the corporate existence of the bank ceased, or that he had died, or that the appellant Carpenter was the administrator of his estate, or that he was the same Solomon Lewis of whose estate appellant was administrator. These were facts, if they existed, which appellant ought to have proved and the court ought to have found, for the purpose of showing that he, in his representative character, was injured or harmed by the error of which he complains. Carpenter was made a defendant personally to the action, but he defended as administrator, and personally he has declined to join in this appeal.

Passing this point, however, we are of opinion that the facts found by the court fail to show that James R. Welden took or held the land in controversy as the trustee of the Huntington County Bank, or of any one else. The land was conveyed to him personally, by an absolute deed of general warranty, and, in the absence of any fact found to the contrary, the fair presumption is that he paid for the land with his own personal means. The only grounds for even an inference to the contrary are (1) that he was cashier of the bank at the time the land was conveyed to him, and (2) that in the land transaction a promissory note, held by the bank against the grantor in such deed, was paid off and surrendered. Any such inferences, however, are abundantly overcome and negatived, we think, by the facts found by the court that the conveyance of the land to James R. Welden was fully known to the other officers of the bank at the time, that neither the bank, during its existence, nor any of its officers or stockholders, asserted any claim to or interest in such land, and that although Welden ceased to be the cashier, within four months after the land was conveyed to him, "there was no such account, as a real estate account, in the books of such bank." It is true these facts are of a negative character, but they are none the less convincing.

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Our conclusion is that upon the facts specially found by the court there is no error in its conclusions of law, and, certainly, none as against the appellant, or of which he can complain.

The judgment is affirmed, with costs.

Filed Dec. 11, 1885; petition for a rehearing overruled Feb. 12, 1886.

 No. 12,103.

BERRY v. MASSEY.

SLANDER.—Pleading.—Evidence.—In an action for slander, where it is alleged that the defendant slandered the plaintiff by charging that he swore to a lie while testifying as a witness in a case theretofore tried, it is competent for the defendant to prove, under the general issue, what the plaintiff testified to as a witness on such trial, because such evidence shows the character of the transaction to which the alleged slanderous words referred.

SAME.—Knowledge of Hearers.—Where the persons who hear a charge made against another know that a particular transaction is referred to, and know also that the transaction was not such as constituted a crime, no action for slander can be maintained.

SAME.—Instruction.—Where the slanderous words complained of charge the plaintiff in an action for slander with having committed perjury, in testimony given in a case theretofore tried, and where the plaintiff's testimony in such case, as put in evidence, shows that he testified to certain things, and afterwards during the progress of the case corrected his testimony, stating that he was mistaken in his former statements, an instruction by the court, to the effect that if the alleged slanderous words spoken referred to such testimony, including the correction thereof, the verdict should be for the defendant, is erroneous.

From the Sullivan Circuit Court.

W. S. Maple, J. S. Bays, S. C. Coulson, J. T. Beasley and
A. B. Williams, for appellant.

J. C. Briggs, J. T. Hays and H. J. Hays, for appellee.

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ELLIOTT, J.—The issue upon which this case went to the jury was formed upon the complaint of the appellant and the general denial addressed to it by the appellee. The complaint alleges that the appellee slandered the appellant by charging that he swore to a lie while testifying as a witness in the case of the Town of Merom against Henry H. Harper.

On the trial the appellee was permitted to prove what the appellant testified to as a witness on the trial of the case referred to in the complaint. The appellant's counsel contended that this was error, because the general denial did not entitle the appellee to prove matters in justification. The counsel of the appellee assert that there was no error, for the reason that the evidence was competent as tending to prove that, under the circumstances known to the persons to whom the alleged slanderous words were spoken, no charge of perjury was made or intended.

This evidence was competent. Our reason for this conclusion is, that the evidence shows the character of the transaction to which the alleged slanderous words referred, and it was proper to submit it to the jury for the purpose of enabling them to determine whether the witnesses who heard these words understood them to import a charge of perjury. Where the persons who hear a charge made against another know that a particular transaction is referred to, and know, also, that the transaction was not such as constituted a crime, no action for slander can be maintained. *Hotchkiss v. Olmstead*, 37 Ind. 74; *Carmichael v. Shiel*, 21 Ind. 66; *Ausman v. Veal*, 10 Ind. 355; *Abrams v. Smith*, 8 Blackf. 95; *Towns. Slander*, sections 137, 160; *Odgers Libel and Slander*, 109.

It is essential that the defendant should affirmatively show that the persons who heard the words spoken by him knew of the transaction to which the words referred. *Williams v. Miner*, 18 Conn. 464; *Dempsey v. Paige*, 4 E. D. Smith, 218; *Van Akin v. Culer*, 48 Barb. 58; *Stone v. Clark*, 21 Pick. 51. But, while this is an essential element of the defence, still the

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court can not exclude the evidence if there is any direct testimony or any circumstantial evidence whatever tending to show that the persons who heard the alleged slanderous words had knowledge of the matter to which the words had reference, and in this instance there was evidence tending to show that some, at least, of the hearers did have such knowledge.

The fourth instruction given upon the request of the appellee is radically wrong. It reads thus:

"Or, if you find from the evidence that plaintiff Berry did testify in substance as aforesaid, and that after such testimony the defendant did speak the words charged in the complaint, or any set of them, of and concerning the plaintiff, and you further find that the facts and circumstances given by the defendant in connection with the speaking of such words show that the words had reference to plaintiff's said testimony and the correction thereof about said survey, and about said Harless' connection with said survey, and about his afterwards stating that he was wrong or mistaken, and that Harless was dead when the survey was made, then your verdict should be for the defendant."

This instruction affirms that if the appellant was innocent of the crime imputed by the words of the appellee, there can be no recovery. This we say, because in the preceding instruction the jury were told that, "If you find from the evidence that the plaintiff, when a witness before a court, after being duly sworn, testified in reference to a certain survey, and that the same was in the year 1871, and that one Mr. Harless was present at such survey and assisted therein; and if you further find from the evidence that plaintiff afterwards, and upon the same trial, in good faith, testified that he was wrong about Harless being present, and that Harless was dead at the time of such survey, such testimony would not constitute perjury, and such conduct would not constitute a felony. In order to constitute perjury a witness must wilfully and corruptly swear to that which is false." And,

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taking these instructions together, as must be done, for the language of the later refers to the former, it is clear that the jury must have understood the court to direct them, that if the plaintiff did not commit perjury the defendant must succeed. It is important to note that the conclusion of the fourth instruction is a direction, in mandatory words, that the verdict should be for the defendant in case the facts enumerated in the instruction were proved. This can only mean that if the appellant did not commit perjury the appellee must recover.

There is, however, another infirmity in the instruction, and that is, that it ignores the element of knowledge on the part of the hearers, and this, as we have said, is a material element. It was not possible for the defendant to succeed upon the theory assumed in the instruction, without showing that those who heard him charge the plaintiff with having sworn to a lie knew of the matter to which the defendant referred. The instruction places the conjunction "or" in such an emphatic position as to leave no doubt what the instruction means, and the jury must have understood it to mean, that if the defendant proved the facts enumerated he should have a verdict. These facts are cut off from the other defences, and are made, by the theory of the instruction, to stand as an independent defence. The jury were thus in express terms instructed that if the facts referred to did exist, then, independently of all other considerations, the defendant must recover.

Judgment reversed.

Filed Dec. 30, 1885.

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No. 11,696.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. GODMAN ET AL.

RAILROAD.—Common Carrier.—Refusal to Receive and Carry Cattle.—Delivery for Transportation.—Where cattle intended for shipment are placed in a railroad company's stock-pens at a station on its road, the refusal of such company afterwards to receive and carry such cattle, excuses any further delivery, or offer to deliver, for transportation, on the part of the shipper.

SAME.—Defective Stock-Pens and Loading Facilities.—Delay of Train Beyond Regular Time to Receive Freight.—Evidence.—Pleading.—Evidence showing no wrong on the part of the railroad company except a failure to construct and keep in repair a proper fence around its stock-pens, and a failure to keep the chute in proper repair, whereby cattle intended for shipment escape from such pens, and their loading on the car was delayed until the train which was to carry them had left the station, will not support a recovery based on a complaint asking damages for a refusal to receive and carry such cattle; nor can a refusal to receive and carry be predicated upon the fact that the train was not held beyond its regular time until the cattle could be loaded.

SAME.—The ways and means for loading being in proper condition, and the duty of loading being upon the shipper, it is his duty to have the car loaded so that the train which is to move it may not be unreasonably delayed.

From the Tippecanoe Superior Court.

W. F. Stillwell, for appellant.

G. O. Behm, A. O. Behm, B. W. Langdon and T. F. Gaylord, for appellees.

ZOLLARS, J.—The following is the only portion of appellees' complaint that needs to be here set out, viz.: "The plaintiffs complain of the defendant and say, that the defendant is a railroad corporation operating a line of railroad between Battle Ground City, in said county, and the city of Chicago, in the State of Illinois, and that at and before the time hereinafter named, said defendant held out to the general public, and caused to be known, that it was a common carrier of freight, stock and cattle, from said Battle Ground and other stations on the line of said railroad between said Bat-

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104	490
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104	490
169	642

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the Ground and said Chicago, and that said defendant had suitable and proper appliances to load and receive stock and cattle at said station; that relying on said representations of the defendant, the plaintiffs applied to the agent of the defendant at said Battle Ground, on the 10th or 11th day of August, 1882, to have shipped by the 16th day of August, 1882, from said Battle Ground to the union stock-yards in said Chicago, by said defendant, seventeen head of fat cattle, the property of the plaintiffs, for the purpose of making sale of said cattle, which purpose and object of the plaintiffs in so shipping said cattle was known at the time by said agent; that the said defendant then, on said 10th or 11th day of August, agreed to and with the plaintiffs to receive and ship said cattle on the 16th day of August, 1882, and that the cattle should be delivered in said union stock-yards at eight o'clock A. M., August 17th, 1882, in consideration of the payment by the plaintiffs to the defendant for the freight or carriage of the cattle the sum of twenty-five (25) dollars, payable on the delivery of said cattle at said yards in Chicago; that plaintiffs, relying upon the representations and promises of the defendant, delivered the cattle, at an expense of \$100, according to the terms of said understanding, at the stock-yards of the defendant at Battle Ground, August 16th, 1882, in full time to ship said cattle. The plaintiffs say that the defendant, by reason of its failure to keep in repair and maintain means and ways to put the cattle on the cars (of which plaintiffs had no knowledge) of the defendant, after the cattle had been driven to Battle Ground and placed in the yards, refused to ship the cattle from Battle Ground station."

Following these averments are the further allegations that, by reason of such refusal, appellees were compelled to drive their cattle to another station on the line of appellant's road; that they were shipped from that station on the next day, and hence did not reach Chicago on the morning of the 17th of August. It is further averred, that the driving of the cattle to the second station necessitated the expenditure of

\$25; that by reason of that drive they lost in weight, and that the delay in reaching Chicago resulted in loss, by reason of a declining market. For these several alleged losses, compensation is asked in the way of damages.

One of the errors assigned here is, that the court below erred in overruling appellant's demurrer to the complaint.

Appellees' theory is, that the gravamen of the action is the failure of the company to maintain and keep in repair proper ways and means for loading the cattle into the cars. If that theory should be adopted, we think the complaint would be insufficient. There is no charge that the railway company had not constructed such means and ways, nor that, as constructed, they were not proper and suitable. What is averred of them is more in the way of recital than of a positive averment of facts. But, regarding it as the averment of facts, it amounts to no more than that the ways and means for loading were out of repair. The word "maintain," used as a verb, does not mean to provide or construct, but, as defined by lexicographers, means to keep up, to keep from change, to preserve. Worcester's Dictionary. To hold or keep in any particular state or condition, to keep up. Webster's Dictionary.

In the case of *Moon v. Durden*, 2 Exchequer R. 21, it was said: "The verb 'to maintain,' in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence."

The extent to which the ways and means for loading the cattle were out of repair is not stated in the complaint, nor is there any averment that they were so out of repair that the cattle might not have been loaded; and hence, as we have said, if the failure to keep in repair be regarded as the gravamen of the action, the complaint is insufficient, and the demurrer should have been sustained.

Regardless of any theory of counsel in the conduct of the trial and in the construction of the complaint, we must pass upon it as it comes before us. The proper construction of

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the complaint is, that the railway company violated its contract and committed a wrong in refusing to receive and carry the cattle from Battle Ground. This is the gravamen of the action. Having thus refused, it is not material nor important what other wrong or neglect upon its part may have been the cause of the refusal; and hence what is averred in relation to the means and ways for loading the cattle, is not essential to the sufficiency of the complaint, nor is it important in determining the sufficiency thereof.

It is argued by counsel for appellant, that the complaint is bad, because there are no averments that appellees delivered, or offered to deliver, the cattle to appellant. The averments are not very specific, but we think they are sufficient to withstand the demurrer.

It is averred that the railway company "agreed * * to receive and ship said cattle"; that appellees "delivered said cattle, * * * according to the terms of said understanding, at the stock-yards of the defendant at Battle Ground," and that "the defendant, * * * after the cattle had been * * * placed in said yards, refused to ship said cattle from said Battle Ground station."

It is not averred in specific terms, that appellees delivered, or offered to deliver, the cattle to appellant, nor that appellant agreed to receive them at its stock-yards. The averments create a strong inference that such was the agreement, and that the cattle were so delivered, but inference, of course, can not take the place of, nor suffice for, allegations in pleadings. It is averred, however, that the cattle were placed in appellant's stock-yards at Battle Ground, and that after this was done appellant refused to "ship" them.

The word "ship," as here used, is not an appropriate word, but in the connection in which it is used it was meant to be, and under our liberal rules of pleading may be regarded as, the equivalent of to receive and carry.

The refusal, under the circumstances, we think, relieved appellees from the necessity of making any further delivery, or

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offer to deliver, the cattle. We hold, therefore, that the demurrer to the complaint was properly overruled.

It was assigned as causes for a new trial, that the verdict is not sustained by sufficient evidence, and is contrary to law.

It is well settled that the plaintiff must recover *secundum allegata et probata*, or not at all. He can not declare upon one theory and recover upon another. *Boardman v. Griffin*, 52 Ind. 101; *Hays v. Carr*, 83 Ind. 275; *Thomas v. Dale*, 86 Ind. 435; *Lake Shore, etc., R. W. Co. v. Bennett*, 89 Ind. 457; *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160; *Brown v. Will*, 103 Ind. 71; *Hasselman v. Carroll*, 102 Ind. 153.

The substance of the evidence in behalf of appellees is as follows: Appellees having notified appellant's agent at Battle Ground, some days in advance, that they wished a car in which to ship their cattle to Chicago, the agent told them that the train would leave Battle Ground in the evening and get to Chicago at eight o'clock the next morning. In compliance with appellees' request, a car was put upon the side-track opposite the chute leading from the cattle-pen. After they had put their cattle in the pen at Battle Ground, appellant's agent at that place told them that they could not load their cattle, because the chute was broken down, and refused to assist them in repairing it. Appellees, and another who was assisting them in the management of their cattle, fixed the chute by placing cord-wood under it. They got it fixed, so that the cattle could be loaded, some two hours and more before the arrival of the train that was to take the car. It was the custom of shippers at that station, including appellees, to car their own live-stock. About two hours after the chute was fixed, appellees commenced loading their cattle. When the train arrived fifteen head of the cattle were in the car. The other two became frightened at the train, escaped from the cattle-pen and ran away. They jumped over the fence of the cattle-pen at a place where a board was missing. There was also evidence tending to show that the fence around the cat-

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tle-pen was too low, although a new fence. Appellees sent two men after the escaped cattle, and also sent another to tell the agent to hold the train until they could be brought back and put into the car. Before this person returned, and before the escaped animals had been brought back, the train left, without taking the car into which appellees were loading their cattle.

It is shown by the testimony of appellees' witness, also, that the train waited from twenty to thirty minutes after the cattle escaped. There is no evidence that appellees requested that the car, with the fifteen cattle, should be forwarded by that train, nor that appellant's servants declined or refused to so forward it. On the other hand, it is apparent that appellees did not demand that it should be so forwarded, from the fact that their idea was to hold the train until the escaped cattle should also be in the car.

The testimony of appellant's witnesses is, that the train was held forty minutes in order that appellees might get their cattle loaded.

From this summary of the evidence, it is very plain that appellant did not refuse to receive and carry the cattle in the sense in which a refusal is alleged in the complaint; indeed, there is no evidence of any refusal, either to accept or to carry. The providing of the car and the holding of the train showed a willingness both to receive and carry the cattle. The evidence shows no wrong on the part of the railway company, unless it be a failure to construct and keep in repair a proper fence around the cattle-pen, and a failure to keep the chute in proper repair. We express no opinion as to the weight of the evidence upon these points, nor as to whether or not appellees suffered any loss by reason of the chute being out of repair.

It is sufficient to say that the case made by the evidence is not the case made in the complaint, and that for that reason the judgment must be reversed.

A refusal to receive and to carry the cattle can not be pred-

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icated upon the fact that the train was not held for a longer time. The ways and means for loading being in proper condition, and the duty of loading being upon the shipper, it is his duty to have the car loaded so that the train which is to move it may not be unreasonably delayed. Trains are, and of necessity must be, run upon schedule time. The transportation of freights, the security of the trains, and the safety of passengers require this. *Frazier v. Kansas City, etc., R. W. Co.*, 48 Iowa, 571. In that case it was said: "A delay of a few minutes at one station might occasion a corresponding delay of every train on the line of road, and even result in accidents, destructive of property and life. No person desiring to become a passenger upon a train could rightfully demand a delay of one minute to enable him to reach the train and get on board. Upon what principle, then, can these plaintiffs demand damages because the defendant's train did not wait until they could drive their hogs into defendant's yards, load four cars, count them, have way-bill made out, shipping contracts signed, and the cars placed in the train?"

If appellant was guilty of any actionable wrong in relation to the cattle-pen and the chute, which occasioned loss to appellees without their fault, which we do not decide, that is the wrong for which it should respond in damages. That, however, is not the wrong charged in the complaint. The conclusion we have reached makes it unnecessary for us to consider other questions discussed by counsel.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to sustain appellant's motion for a new trial, and to grant leave to appellees to amend their complaint if they so desire.

Filed Jan. 7, 1886.

Tracewell, Administrator, v. Farnsley.

No. 12,163.

TRACEWELL, ADMINISTRATOR, v. FARNSLEY.

PRACTICE.—*Pleading.—Harmless Error.*—Where it affirmatively appears on the face of the record that the judgment rests on a good paragraph of a pleading, an error in overruling a demurrer to a bad paragraph is harmless.

From the Harrison Circuit Court.

W. N. Tracewell and *R. J. Tracewell*, for appellant.

B. P. Douglass and *S. M. Stockslager*, for appellee.

ELLIOTT, J.—The appellee filed a petition, consisting of two paragraphs, asking that personal property be set apart to her, as the widow of William H. Farnsley, deceased. In the first paragraph, she claims \$500 under the law of Indiana, averring that her husband was a resident of this State at the time of his death, although temporarily absent in Kentucky; in the second, she claimed \$700 under the laws of Kentucky where her husband died.

The appellant's contention is, that the second paragraph is bad because it does not set out the statute of Kentucky.

We do not deem it necessary to decide the question argued, for it affirmatively appears that the appellee was allowed only \$500, and that the finding and judgment rest on the first paragraph of the petition.

It has been again and again decided that where it affirmatively appears on the face of the record that the judgment rests on a good paragraph of a pleading, an error in overruling a demurrer to a bad paragraph is harmless. This is in harmony with the general rule which prevails almost everywhere, that where it is clear that the error did not prejudice the rights of the appellant, the judgment will not be reversed. *Lancaster v. Collins*, 115 U. S. 222; *Hornbuckle v. Stafford*, 111 U. S. 389; *Mining Co. v. Taylor*, 100 U. S.

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37. This general rule has been many times declared and enforced in this court.

Judgment affirmed.

Filed Jan. 7, 1886.

No. 12,315.

MILLIKAN v. HAM ET AL.

TAXES.—*Lien for City Tax Paid by Purchaser.*—Where one who has purchased real estate at a tax sale for non-payment of State and county taxes, afterwards pays the city tax on such property, he may, in a suit to quiet title, have the same allowed and decreed a lien on the real estate as part of the original claim for the purchase-price.

From the Madison Circuit Court.

C. L. Henry and H. C. Ryan, for appellant.

M. A. Chipman, for appellees.

HOWK, J.—In their brief of this cause, appellant's learned counsel request this court to decide the following question, namely: "Can one who has purchased real estate at a tax sale for non-payment of State and county taxes, afterwards pay the city tax, and, in a suit to quiet title, have the same allowed and decreed a lien on the real estate as part of the original claim for purchase-price?"

This question seems to be fairly presented for decision by the record of this cause and the error assigned by appellant upon the overruling of his motion for a new trial. It appears from the record of this cause, that, on the 9th day of February, 1880, at a public sale by the treasurer of Madison county of lands and lots therein returned delinquent for the non-payment of State and county taxes previously assessed thereon, the appellant became the purchaser of the real estate described in his complaint, and situate within the corporate limits of the city of Anderson in such county, and

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listed and taxed in the name of the appellee, Mahala Ham, for the sum of \$57.12, the amount of delinquent and current taxes, penalties and costs, then due and owing on such real estate; and that, on the same day, upon his payment of such sum of money, the treasurer of Madison county executed to appellant a certificate of his purchase of such real estate. It further appears that, on the 12th day of June, 1882, more than two years having elapsed, and such real estate not having been redeemed from such tax sale thereof, the auditor of Madison county executed to the appellant a tax deed of such real estate, which deed he still held when he commenced this suit. It is claimed by appellant that, to protect his interest in such real estate under his said purchase thereof, he had paid all the taxes that had accrued and accumulated thereon, including the sum of \$69.79, paid by him on the 6th day of March, 1882, which had been assessed on such real estate by the proper authorities of the city of Anderson, for municipal purposes.

Appellant's complaint contained two paragraphs. In the first paragraph, he stated the foregoing facts in relation to his purchase of Mahala Ham's real estate, at a tax sale thereof for delinquent State and county taxes, and to his payments of all the taxes that had accrued thereon, including such city taxes, and also some other facts which have no bearing on the question we are required to decide, and which we need not further notice. Admitting the insufficiency of his tax deed to convey to him the title to the real estate described therein, the appellant asked the court, in the first paragraph of his complaint, to ascertain upon final hearing the full amount due him on such real estate for all taxes thereon, including such city taxes, penalties, interest and costs, to decree such amount to be a lien on the real estate, and to foreclose such lien, etc. The second paragraph was an ordinary complaint by the appellant to quiet his title to the same real estate.

The cause having been put at issue, the court upon final

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hearing found for the appellant for the amount paid by him in the purchase of the real estate at the tax sale thereof, and for the amount of State and county taxes subsequently paid by him, and rendered its judgment and decree accordingly. Appellant's motion for a new trial or hearing having been overruled, he has appealed to this court. A bill of exceptions, containing the evidence and the rulings of the court in the exclusion of offered evidence, is properly in the record.

It is shown by the bill of exceptions, that when the appellant offered to prove his payment of the taxes assessed by the city of Anderson upon the real estate in controversy, for municipal purposes, in the sum of \$69.79, every offer of such evidence, oral or written, was objected to by the appellees, upon the grounds of irrelevancy, incompetency and immateriality; and that these objections were sustained and the evidence excluded by the court in every instance. These grounds of objection are so general and uncertain that it is difficult, if not impossible, to determine therefrom why the court excluded the offered evidence. In his brief of this cause, however, the appellees' counsel has attempted to sustain the rulings of the circuit court in the exclusion of the offered evidence, upon the ground chiefly that, "in the absence of a statute, the payment of appellees' taxes by appellant, without a request (and none is averred or claimed), would be a voluntary payment and could not be recovered." The chief difficulty with this position of counsel, as it seems to us, is that here there is no "absence of a statute."

In section 229 of the tax law of December 21st, 1872, which was in force at the time of the tax sale to the appellant, and which section was literally re-enacted as section 219 of the tax law of March 29th, 1881, and is now in force as re-enacted as section 6488, R. S. 1881, it was and is provided as follows:

"If any conveyance for taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient, or for any other cause than the first two enumerated in

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the preceding section, the lien which the State has on such lands shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to recover from the owner of such land the amount of taxes, interest, and penalty, legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest; and such lands shall be bound for the payment thereof." See, also, section 6497, R. S. 1881.

The provisions quoted of section 6488 are certainly broad and comprehensive enough to include taxes assessed by incorporated cities for municipal purposes. It is contended, however, by appellees' counsel, that this section of the statute can not be held to include city taxes, because it provides for the transfer of the State's lien to the grantee in the tax deed, and the State has no lien for city taxes. This contention can not be sustained, we think, because the transfer of the State's lien is effected only by and through the tax deed, and is vested in the grantee as a security for the amount legally due at the time of the sale; while, as to the "amount of all subsequent taxes paid, with interest," the statute declares that the lands shall be bound for the payment thereof. The phrase "all subsequent taxes paid," in the statute, construed with reference to its context, means all taxes paid subsequently to the tax sale, whether assessed before or after the sale. In section 3263, R. S. 1881, it is provided that "Hereafter all general laws of the State for the uniform assessment and collection of taxes, and matters connected therewith or growing out of the same, shall apply to all incorporated cities and towns not having special charters, so far as the same shall be applicable." We are of opinion that the sections of the general tax law above cited can and ought to be so construed as to enable any one who has acquired a lien on lands, under their provisions, to enforce the collection of the full amount of all taxes subsequently paid by him, whether State, county or city taxes, from the lands "bound for the payment thereof." This is not a forced construction of the language used in those sec-

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tions, and it is in perfect harmony with what we regard as the intention of the Legislature in their enactment. The purpose of the legislation was two-fold: 1. To secure the purchaser of land at a tax sale, if his title should prove invalid, in the repayment of his money; and, 2. To encourage him in the payment of all other taxes which had been or might be assessed on such land, by declaring that the land should be bound for the payment thereof. Manifestly, this two-fold purpose of the legislation would be best subserved by the construction we have given to those sections of the statute.

The view we have taken of the question under consideration is supported, we think, by the recent case of *Justice v. City of Logansport*, 101 Ind. 326. It was there held, substantially, that taxes levied by incorporated cities for municipal purposes are, in effect, levied by the State, and are not inferior in rank, dignity or priority to taxes levied for State or county purposes. For these reasons it was also held that a sale of land for State and county taxes would not divest the lien thereon of city taxes.

From what we have said it follows of necessity that the question propounded by appellant's counsel, and stated in the outset of this opinion, must be answered in the affirmative. Upon the facts of this case, as they appear in the record and are herein stated, appellant was entitled to a decree for the amount of city taxes paid by him, with interest, and, in default of payment, for the sale of the land bound for the payment thereof. The court erred, we think, in excluding the several items of evidence offered by appellant tending to prove his payment of the city taxes, and, for these errors of law, his motion for a new trial ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Jan. 6, 1886.

Lipes et al. v. Hand et al.

No. 11,598.

LIPES ET AL. v. HAND ET AL.

DRAINAGE—Improving Natural Stream.—Legislative Power.—The Legislature has power to enact a statute, such as that of April 8th, 1881, providing that natural streams may be improved.

SAME.—Repeal.—The drainage act of April 8th, 1881, was not repealed by the act of April 21st, 1881.

SAME.—Commissioners.—Irregular Appointment.—Bill of Exceptions.—Practice.—Where the court approves the acts of drainage commissioners who are serving under its authority, it must appear by a proper bill of exceptions that timely objection, for any cause, was made to their action by the remonstrants; otherwise the rulings of the trial court will be respected.

SAME.—Report.—Time of Filing.—Discretion of Court.—The trial court has discretionary authority to extend the time of filing the report of the drainage commissioners.

SAME.—Special Proceedings.—Trial by Jury.—Legislative Power.—The Legislature has power to provide that in special proceedings the trial shall be by the court, and not by jury.

SAME.—Trial Governed by Statute in Force at Time.—The statute in force at the time of the trial governs as to the procedure.

SAME.—Assessment of Benefits.—General and Special Benefits.—In the assessment of benefits in drainage proceedings, the land-owner should not be charged with general benefits which accrue to him as a member of the community, but only with such as are special.

SAME.—What are Special Benefits.—Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value.

SAME.—Outlet.—Lateral Ditches.—Where the construction of a large ditch, or the improving of a natural stream, enables land-owners to carry their lateral ditches into it, and to thus secure good drainage without encroaching upon the rights of others, there is a special benefit.

SAME.—Act of April 8th, 1881, Constitutional.—The drainage act of April 8th, 1881, providing for proceedings in the circuit court, is not unconstitutional as being in conflict with section 23 of the Bill of Rights because it denies the right of trial by jury, while the act of April 21st, 1881, relating to proceedings before the county commissioners, grants that right.

From the Allen Circuit Court.

R. S. Robertson and J. B. Harper, for appellants.

T. E. Ellison, for appellees.

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154 120
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Lipes *et al.* v. Hand *et al.*

ELLIOTT, J.—The appellees, proceeding under the act of April 8th, 1881, petitioned for the establishment of a ditch, and their petition was resisted by the appellants.

The point first made is that the circuit court had no jurisdiction of the subject-matter, and that its proceedings are void. One reason stated in support of this contention is that the petition seeks to deepen and straighten a river, and that the circuit court has no jurisdiction in such matters. The statute supplies a full answer to this contention, for it expressly provides that natural streams may be straightened, widened and deepened. R. S. 1881, section 4275. The Legislature has power to enact such a statute. Gould Waters, section 248.

Another reason urged in support of this position is that the act of April 8th, 1881, is repealed by the act of April 21st, 1881. This point has heretofore been decided against the appellants, and we have no doubt as to the soundness of those decisions; indeed, the language of the latter statute clearly shows that there was no repeal. *Shaw v. State, etc.*, 97 Ind. 23; *Crist v. State, ex rel.*, 97 Ind. 389; *Buchanan v. Rader*, 97 Ind. 605; *Meranda v. Spurlin*, 100 Ind. 380.

It is contended that the circuit court did not select drainage commissioners from six persons nominated by the township trustees, as required by section 4273, and that for this reason the proceedings are void. We do not think this question is presented by the record. The motion to strike out the report on the ground now urged was made at the November term, 1883. No time was then asked or allowed in which to file a bill of exceptions, and none was filed until February, 1885. This was too late to save the question; leave to file a bill should have been asked and obtained during the term. Where persons assume to act under the authority of the court, where there is an order appointing them, and where their acts are approved by the court, it must appear by a proper bill of exceptions that timely objection to their acting was made by the remonstrants; otherwise the rulings of the trial court will be respected.

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It appears from the record that no harm resulted to the appellants from striking out some of their causes of remonstrance, and even if it were conceded that this ruling was erroneous, there could be no reversal, for harmless errors will not reverse a judgment.

The court had authority to extend the time of filing the report of the commissioners. It is a familiar rule that where a judicial tribunal has a general power to designate a time within which an act shall be done, it may extend the time. Such a power is regarded as a discretionary one, and the exercise of it by the court will not be interfered with unless there has been an abuse of discretion. If the power is limited to a certain time, then, of course, a different rule prevails.

The drainage laws have so often been declared constitutional that the question can no longer be deemed an open one.

It is contended that the court erred in refusing appellants a trial by jury. The power of the Legislature to provide that in special proceedings the trial shall be by the court, and not by jury, is fully established by the decisions upon the subject; there is, indeed, no contrariety of opinion. *Anderson v. Caldwell*, 91 Ind. 451 (46 Am. R. 613); *Indianapolis, etc., G. R. Co. v. Christian*, 93 Ind. 360; *Ross v. Davis*, 97 Ind. 79. We have no doubt as to the constitutional power of the Legislature to provide for the trial of drainage cases by the court.

In support of the contention of the right to a trial by jury appellants assert that the statute does not deny it upon all causes of remonstrance, and that, conceding the statute to be constitutional, they were nevertheless entitled to a jury. We can not assent to this doctrine. The statute expressly says that "Remonstrances founded on the second, third, fourth, fifth, sixth, seventh, eighth, or ninth causes of remonstrance shall be tried by the court without a jury," and of the other cause, the first, it says: "If the court be of the opinion that the first cause of the remonstrance above enumerated exists, it shall direct the commissioners to amend and perfect their

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report; or the court may, in its discretion, set aside said report." Acts 1883, 177. This language plainly commits the question to the court, and when the first cause for remonstrance is considered, namely, "That the report of the commissioner is not according to law," it becomes still clearer that such a question was not intended to be tried by a jury.

The law is well settled that the statute in force at the time of the trial governs as to the procedure, and as the act of 1883 was in force when this case was tried, it governed as to the procedure on the trial.

The difficult question in the case is as to the rule which shall govern in the assessment of benefits. The language of the statute is very broad; it is this: "They (the commissioners) shall proceed and definitely determine the best and cheapest method of drainage, the termini and route, location and character of the proposed method, and fix the same by metes and bounds, courses and distances, and description, estimate the cost thereof, assess the benefits or injury, as the case may be, to each separate tract of land affected thereby, and to easements therein held by railway or other corporations." This language is very comprehensive and includes every appreciable benefit of a private character to the landowner, but, broad as it is, we do not think that it can be construed to extend to the general benefits which the landowner receives as one of the public. Counsel have not referred to any authorities upon this subject, and the only decisions we have been able to find in the course of our search are those made in cases where benefits and damages for the opening of highways were claimed. Judge Dillon, in discussing this general subject, says: "And here, most usually, arises the difficult inquiry, What benefits and what injuries are proper to be regarded as affecting the question of damages? Now, benefits and injuries are of two kinds: I. General or public, being such as are not peculiar to the particular proprietor, part of whose property is taken, but those benefits in which he shares and those injuries which he sus-

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tains in common with the community or locality at large. II. Special or local, being those peculiar to the particular land-owner, part of whose property is appropriated, and which are not common to the community or locality at large, such, on the one hand, as rendering his adjoining lands more useful and convenient to him, or otherwise giving them a peculiar increase in value, and, on the other, rendering them less useful or convenient, or otherwise, in a peculiar way, diminishing their value. The former class of benefits or injuries—namely, those which are general, and not special—have, according to the almost uniform course of decision, no place in the inquiry of damages, and can not be considered for the purpose of reducing the amount, being too indirect and contingent; but injuries which specially affect the proprietor, or benefits which are specially conferred upon his adjacent property, part of which is taken, are to be considered, unless, by the Constitution of the State or legislative enactment, all benefits, special as well as general, are to be excluded.” 2 Dillon Mun. Corp. (3d ed.), section 624.

We think that the rule which prevails in analogous cases should be adopted in these drainage cases, and that the land-owner should not be assessed with general benefits which accrue to him as a member of the community.

As the land-owner is not to be charged with general benefits, but is to be assessed with all special benefits, it becomes necessary to inquire and determine what are special benefits. Whatever gives an additional value to the particular parcel of land is a special and not a general benefit, and it may be a special benefit, although not an immediate one. Suppose, for illustration, that the person assessed owns a tract of land situated on a knoll and well drained in every part, but that on all sides of it are great ponds rendering access difficult, and isolating it from highways, a drainage of the ponds would benefit the land-owner, although it might not carry any water at all immediately from his land, and such a benefit would be a special and not a general one. In estimating

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damages, the general rule, as declared by a recent writer, is, that "in estimating value everything which gives the land intrinsic value is to be taken into consideration." 3 Sutherland Damages, 441. There can be no valid reason why the same general rule should not apply to benefits in drainage cases, for whatever gives intrinsic value to the land specially benefits it. The author just referred to, in speaking of benefits, says: "These benefits are estimated like damages." 3 Sutherland Damages, 452. The conclusion to which the authorities lead is, that benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value. 3 Sutherland Damages, 454 to 462; *Allen v. Charlestown*, 109 Mass. 243; *Whitney v. Boston*, 98 Mass. 312; *Farwell v. Cambridge*, 11 Gray, 413; *Milwaukee, etc., R. R. Co. v. Eble*, 4 Chand. (Wis.) 72.

Where the construction of a large ditch enables property owners to carry their lateral ditches into it, and to thus secure good drainage without encroaching upon the rights of others, there is a special benefit. This results from the rule that one land-owner has no right to collect water in a body and pour it upon the land of another. *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 46), *vide* opinion 328, 329; *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135), *vide* pp. 251, 248, 257; Gould Waters, sections 271, 272, 536. Where a land-owner obtains an outlet for lateral ditches constructed for the drainage of his land, by means of a large ditch, or by reason of the widening, deepening, and straightening of a natural stream, he receives a special benefit, for he is thus provided with means of drainage without injury to others. The evidence shows the appellants to have received this and other special benefits, and we can not disturb the finding of the trial court upon the evidence.

It may possibly be true that the appellants, under the existing condition of affairs, could lead their lateral ditches into the swamps and ponds without appreciable injury to their

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owners, but as soon as these swamps and ponds are drained, as they will be by the contemplated improvement, the appellants would no longer have the right to lead their ditches to the land reclaimed, since this would be to collect water in artificial channels and pour it upon the lands of others to their injury, and this the appellants have no right to do. It results, therefore, that in securing outlets for their lateral ditches they do secure a special benefit.

In most cases the question whether there is or is not a special benefit is one of fact to be determined from the evidence in the particular case. This is so in the present instance, and under the settled rule we can not disturb the finding of the court upon the evidence.

Judgment affirmed.

Filed June 27, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—This case has been fully argued both orally and in elaborate briefs, but we are again asked to review the rulings of the trial court and our own.

It is now insisted that we did not decide one of the questions argued. We can not agree with counsel upon this point. We did decide, as many cases in our own and in other courts required us to do, that the drainage law was constitutional, and this necessarily included all phases of the question. We have, however, yielded to the earnest appeal of counsel, and now expressly discuss the phase of the question which they seem to think was left undecided.

The position assumed by counsel in their discussion of the case, as we understand their argument, is this: The statute of April 8th, 1881, denies a right to a trial by jury, while that of April 21st, 1881, confers that right, and the former statute is, therefore, in conflict with the provision of the Constitution which reads thus: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally

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belong to all citizens." No authority is cited in support of this position, and, although we have carefully searched the books, we can find none that lends it the slightest support.

"The act of April 8th, 1881, provides for proceedings in the circuit court; while that of April 21st, 1881, provides for proceedings before the board of commissioners. There are, therefore, two distinct courts and two distinct proceedings designated and provided for in the two statutes. Parties in the same court have the same rights, but there is a difference in the procedure of the two courts. The privileges are granted upon the same terms, that is, the rules prescribed for the one court apply to all parties who come into that court. It has always been the legislative practice in this State to prescribe different methods of procedure for different courts. No one has ever supposed that because one method of procedure is provided for the circuit court, and another for the board of commissioners, the Constitution has been violated. We have always had different rules of procedure for the circuit court and for the courts of the justices of the peace, and no one has ever thought of questioning the validity of the statutes prescribing the modes of procedure for those courts. It is perfectly clear that prescribing different methods of procedure for different tribunals is not denying to one class of citizens rights conferred upon another class. Citizens litigating in different courts are not upon the same terms, for they are in different tribunals governed by different systems of procedure.

There is no discrimination between different classes of citizens, nor, indeed, is there anything bearing the faintest resemblance to a discrimination. There is a discrimination as to methods of procedure in different tribunals, but none between citizens. Privileges and immunities are not granted to one class and denied to another. The distinction is between judicial tribunals, not between citizens. If we hold the act of April 21st, 1881, unconstitutional, then we must hold that there can be one judicial tribunal only for the trial

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of all cases, and that there must be one procedure in all courts, and this would carry us into conflict with decisions that have stood unchallenged for many years. The statutes in reference to arbitrators, to commissioners for the assessment of damages, to the courts of the justices of the peace and of the county commissioners, must all go down, if the appellants' position is maintainable. That it is not maintainable we have no doubt.

If we did entertain doubt as to the constitutionality of the statute, we should still be bound to sustain it, for it has been decided time and again that a statute will be upheld unless its unconstitutionality is so plain that no doubt can be entertained.

We have many cases in our own reports, and there are many in the reports of other States, holding that different rules of pleading and of practice may be prescribed for different courts. There are, indeed, scores of cases holding that different rules may be prescribed for the trial of different classes of cases in the same court; as, for instance, chancery and common law cases, probate cases and ordinary civil actions. These statutes do not, it is quite clear, confer upon one class of citizens privileges and immunities that are denied to other classes; they do no more than prescribe different methods of procedure for different tribunals and different classes of actions. For this plain reason no one, until this late day, has ever thought of assailing their validity.

We do not care to add to what was said in the former opinion upon the question of the assessment of benefits, further than to examine some authorities to which our attention has been called by the counsel for the appellees, and to set down a thought or two which they suggest. These authorities carry the doctrine farther than we deemed it necessary to do. Judge Cooley maintains that "the only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improve-

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ment on the market value of the property." Cooley Taxation, 459. In the *Matter of Furman Street*, 17 Wend. 650, the same general doctrine is maintained in a very able opinion by BRONSON, J., and this doctrine is adopted in *State, etc., v. Mayor, etc.*, 35 N. J. L. 157, 167.

It is apparent, therefore, that there may be a benefit to a tract of land although its drainage facilities may not be increased, but we need not elaborate this point, for we gave it consideration in our former opinion. The statute does not, as appellants unwarrantably assume, confine the assessment to the single particular of an increase in the drainage facilities, for the statute does not restrict the assessment of benefits or of damages to any one kind of benefit or injury. It is clear that land might be injured by a ditch, and yet its drainage facilities be not impaired; on the other hand, as was shown in our former opinion, land might be materially benefited although its drainage facilities may not be directly increased. But, in this instance, there was evidence tending to show that the proposed improvement would benefit the lands of all the appellants by affording better drainage.

Petition overruled.

Filed Jan. 7, 1886.

No. 11,792.

SHULSEE v. MCWILLIAMS.

SLANDER.—*Open and Close.*—*Argumentative Denial Pro Tanto.*—The plaintiff in an action for slander, in which only an argumentative denial *pro tanto* of the complaint has been filed, is entitled to open and close the case to the jury.

PRACTICE.—*Jury may Take Pleadings to Jury-Room.*—It is not error to permit the jury to take with them to the jury-room the pleadings in the cause.

SAME.—*Bill of Exceptions.*—*Filing.*—A bill of exceptions, in order that

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140	545
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143	365
143	448
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147	512
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157	210

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it can be considered part of the record, must have been filed as required by section 629, R. S. 1881.

From the Hamilton Circuit Court.

C. S. Wesner, F. M. Charlton, T. W. Lockhart, T. J. Kane
and *T. P. Davis*, for appellant.

T. H. Palmer, for appellee.

Howk, J.—In this case the appellee sued the appellant in the Boone Circuit Court to recover damages for slander. As originally filed, appellee's complaint contained four paragraphs, but, before the trial of the cause, she dismissed her suit as to the second and third paragraphs of her complaint. Issues were joined upon the first and fourth paragraphs of complaint, and, the venue of the cause having been changed to the court below, were there tried by a jury, and a verdict was returned for the appellee, assessing her damages in the sum of \$400. Over appellant's motion for a new trial, the court rendered judgment against him on the verdict, in appellee's favor, for the damages assessed and costs.

In this court, the first ruling below complained of as erroneous, by appellant's counsel in argument, is the overruling of appellant's motion for leave to open and close the trial of the cause to the jury. On this point, the rule of practice under section 536, R. S. 1881, of our civil code, is, that the party having the burden of the issue, on the trial, shall have the opening and closing of the case to the jury. *Kinney v. Dodge*, 101 Ind. 573. In the first and fourth paragraphs of her complaint, the appellee alleged that the appellant had "falsely, maliciously and slanderously" spoken to certain named persons, of and concerning appellee, certain "false, malicious and slanderous words," setting them out, imputing to her a want of virtue and chastity. To these paragraphs the appellant answered in a single paragraph, covering six pages of closely-written legal-cap paper, which it is difficult to characterize. It was prepared, apparently, for the purpose

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of enabling the appellant to obtain the opening and closing of the case to the jury; but it failed, and properly so, we think, to enable him to accomplish such purpose. After admitting that he had spoken substantially the same words, stated in the complaint, setting them out and giving at great length his version of the circumstances under which the words were spoken, his answer proceeds as follows: "The defendant avers that all statements made by him, alleged in the complaint of the plaintiff, were of and concerning such plaintiff, but without malice."

It will be readily seen that this answer does not confess and avoid the cause of action stated in appellee's complaint. On the contrary, it affirms facts which are utterly inconsistent with the truth of facts entering into and constituting a material element in appellee's cause of action. Such an answer is what is generally called an argumentative denial *pro tanto* of the complaint, and the burden of the issue formed by such denial is of course on the plaintiff and gives her the right to open and close. *Rothrock v. Perkinson*, 61 Ind. 39; *Kinney v. Dodge*, *supra*. There was no error, therefore, in the court's refusal to allow appellant to open and close the case to the jury.

Appellant's counsel next insist, that the trial court erred in permitting the jury to take with them, in their retirement to consider of their verdict, the pleadings in the cause. There was no error in this action of the court. *Snyder v. Braden*, 58 Ind. 143; *Summers v. Greathouse*, 87 Ind. 205. In each of the cases cited it is squarely decided that there is no error in placing the pleadings in the cause in the hands of the jury; and the appellant's objection and exception to the action of the court are limited to the pleadings in the cause.

The next error, of which appellant's counsel complain in argument, is the giving of certain instructions to the jury trying the cause. Appellee's counsel earnestly insists, that the instructions complained of are not properly in the record and, therefore, can not be considered. This point seems to

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be well taken. The appellant attempted to make all the instructions given by the court, and those requested by him and refused, a part of the record of this cause, by having the same embodied in a bill of exceptions. What purports to be such a bill of exceptions has been copied by the clerk of the court below into the transcript before us; but there is nothing in the transcript to show that such bill was or had ever become a part of the record of this cause. In section 629, R. S. 1881, of our civil code, it is provided that such a bill of exceptions must be filed in the cause; and "When so filed, it shall be a part of the record." In the transcript of this cause there is no memorandum, recital or file-mark to indicate when such bill of exceptions was filed, or, indeed, that it ever has been filed in this cause. What purports to be such bill is not a part of the record of this cause, and therefore the instructions, as well those given as those asked for and refused, are not in the record and can not be considered. This is settled by the decisions of this court. *Loy v. Loy*, 90 Ind. 404; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245; *Pratt v. Allen*, 95 Ind. 404.

We can not disturb the verdict of the jury on the evidence. It fairly tends to sustain the verdict on every material point. In such case, where the verdict has met the approval of the trial court, we must decline, as we always have declined, to reverse the judgment on the evidence.

We find no error in the record.

The judgment is affirmed with costs.

Filed Nov. 7, 1885; petition for a rehearing overruled Jan. 9, 1886.

Jackson v. The State, for Use of Dyar, Drainage Commissioner.

No. 11,787.

JACKSON v. THE STATE, FOR USE OF DYAR, DRAINAGE
COMMISSIONER.

DRAINAGE.—Notice.—Collateral Attack.—Where, in a drainage proceeding under the act of April 8th, 1881, there has been a notice of the general character required by the statute, yet defective, the order of the court based on such notice is conclusive as against a collateral attack.

SAME.—Pleading.—Jurisdiction.—Case Criticised.—In a proceeding to enforce a drainage assessment, it is not necessary to aver in the complaint that the defendant or his grantor was a party to the original proceeding, as by the assumption of jurisdiction in that proceeding and judgment by the court there was an adjudication of all jurisdictional questions. *Shaw v. State, etc.*, 97 Ind. 23, criticised.

From the Howard Circuit Court.

J. W. Kern, J. W. Cooper, B. F. Harness, J. C. Blackledge, W. E. Blackledge and B. C. H. Moon, for appellant.

M. Garrigus, for appellee.

ELLIOTT, J.—The appellee's complaint seeks to enforce a drainage assessment, levied under the act of April 8th, 1881. The sufficiency of this complaint is challenged upon two grounds: *First*. That there was not such notice as the statute requires, for the reason that there was but nineteen days notice, instead of twenty as the statute requires. *Second*. That it fails to show that the appellant, or his grantor, was a party to the original proceedings.

Of these in their order: *First*. There was notice, and, although defective, the order based upon it was not void. This doctrine is affirmed in many cases. *Quarl v. Abbett*, 102 Ind. 233; *Brown v. Goble*, 97 Ind. 86, see auth. p. 89; *City of Terre Haute v. Beach*, 96 Ind. 143; *McCormick v. Webster*, 89 Ind. 105; *Million v. Board, etc.*, 89 Ind. 5, vide p. 12; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Stout v. Woods*, 79 Ind. 108; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409.

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155	498
104	516
158	337
104	516
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The general rule is thus expressed in *Morrow v. Weed*, 4 Iowa, 77: "If there be a notice or publication, or whatever of this nature the law requires in reference to persons or other matters, its sufficiency can not be questioned collaterally." This doctrine was reaffirmed by the same court in *Bonsall v. Isett*, 14 Iowa, 309, and in *Ballinger v. Tarbell*, 16 Iowa, 491. The great current of authority runs in favor of this doctrine. *Hendrick v. Whittemore*, 105 Mass. 23; *Cook v. Darling*, 18 Pick. 393; *Finneran v. Leonard*, 7 Allen, 54; *Wright v. Marsh*, 2 Greene (Iowa), 94; *Paine v. Mooreland*, 15 Ohio, 435; *Borden v. State, etc.*, 6 Eng. (Ark.) 519; *Sheldon v. Wright*, 5 N. Y. 497; *Delaney v. Gault*, 30 Pa. St. 63; *Callen v. Ellison*, 13 Ohio St. 446; *People v. Hagar*, 52 Cal. 171.

It has long been the rule in this State, that where a court is required to determine whether facts essential to jurisdiction exist, a judgment that they do exist will be conclusive as against a collateral attack. *Evansville, etc., R. R. Co. v. The City of Evansville*, 15 Ind. 395. It was said in that case: "It is a well settled principle, that where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle, by its decision, such decision is conclusive." The doctrine of that case has been repeatedly asserted, and we cite only a few of the many cases that have adopted and enforced it. *Forsythe v. Kreuter*, 100 Ind. 27; *Young v. Wells*, 97 Ind. 410; *Smith v. Hess*, 91 Ind. 424; *Million v. Board, etc.*, 89 Ind. 5, and authorities cited p. 14; *City of Madison v. Smith*, 83 Ind. 502; *Marshall v. Gill*, 77 Ind. 402. This rule is well supported by the decisions of other courts. *Grignon's Lessee v. Astor*, 2 How. 319; *Riley v. Waugh*, 8 Cush. 220; *Cooper v. Sunderland*, 3 Clarke, (Iowa) 114; *Henderson v. Brown*, 1 Caines, 92; *Vail v. Owen*, 19 Barb. 22; *Youngman v. Elmira, etc., R. R. Co.*, 65 Pa. St. 278; *Sheldon v. Wright, supra*. These cases proceed on the theory that the court has authority to decide all questions, whether affecting the jurisdiction or other matters, and this is the only logical ground

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upon which they can be maintained. If it be conceded that the court does not by its decision determine the sufficiency of a notice, then it must also be conceded that these cases are wrongly decided, and this would result in the overthrow of a long and unwavering line of decisions. Once it is granted that these decisions are sound, then the conclusion that the court may settle jurisdictional questions is inevitable. Of course, this rule can not apply where there is no jurisdiction of the subject-matter, or where there is no notice or summons, but it does apply in all cases where there is some notice, or some writ and service, although defective.

Appellant's counsel are unfortunate in the citation of *Taylor v. Conner*, 7 Ind. 115, for the statement of the judge, which seems to favor their position, was, as the opinion shows, repudiated by the court. Where the statute prescribes what the character of the notice shall be, then mere information conveyed to the defendant in a manner wholly unauthorized can not be deemed sufficient to confer jurisdiction. The notice must assume to be such as the law requires, but, in order to repel a collateral attack, it need not be a valid notice. *Morrow v. Weed*, 4 Iowa, 77. To hold otherwise would be to break down the distinction between direct and collateral attacks. All that *Vizzard v. Taylor*, 97 Ind. 90, can be regarded as deciding upon this question is, that there must be some notice, and that it is not sufficient that mere information is conveyed to the party in a manner wholly unauthorized by law. As shown in *Young v. Wells*, 97 Ind. 410, and in *Albertson v. State, ex rel.*, 95 Ind. 370, the case of *Scott v. Brackett*, 89 Ind. 413, was a direct attack by appeal, and that decision can not apply to a collateral attack.

In the case of *Albertson v. State, ex rel., supra*, the court quoted the provision of the statute that "collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries; but such judgment shall be conclusive that all prior proceedings were

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regular and according to law," and held that an action to collect the assessment could not be defeated upon the ground that the complaint does not aver that notice of the petition was given. The reason for this ruling is that the attack made upon the complaint is a collateral, and not a direct one.

Young v. Wells, supra, affirms a like principle. These decisions do not, of course, affect defences arising subsequent to the judgment of the circuit court, for they can not be deemed adjudicated, but, by force of the statute, and under the general rules of law referred to, matters affecting the power of the court are adjudicated.

We come now to the second objection urged against the complaint, namely, that it does not aver that the appellant, or his grantor, was named in the petition filed in the original proceedings. We have no doubt that the petition must name the land-owners whose deeds are of record, and this we have often decided. *Troyer v. Dyar*, 102 Ind. 396; *Vizzard v. Taylor, supra*; *Wright v. Wilson*, 95 Ind. 408; *Young v. Wells, supra*.

The court can only have jurisdiction of persons who are made parties to the proceedings in the method prescribed by law, and it is upon this theory that these cases proceed. Judgments bind only such persons as are made parties, for the reason that it is only of parties that the court has jurisdiction. Where the law requires persons to be made parties by naming them in the petition, that method must be substantially pursued, although a mere error or irregularity would not make the judgment void. These cases do not, as counsel assume, proceed on the theory that a defective petition may be questioned collaterally, or that any defect or irregularity may be made available in a collateral attack to impeach the judgment, but they proceed on the theory that the complainant was not a party to the proceeding. We regard some notice as indispensable; so much so that it can not be dispensed with by the Legislature. *Campbell v. Dwiggin*s, 83 Ind. 473; *Wishmier v. State, etc.*, 97 Ind. 160; *Neiman v. State, ex rel.*,

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98 Ind. 58; *Strosser v. City of Ft. Wayne*, 100 Ind. 443, see p. 446; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Troyer v. Dyar, supra*; *Jackson v. State, etc.*, 103 Ind. 250; *Hobbs v. Board, etc.*, 103 Ind. 575. But where the court adjudges that notice has been given, this implies notice to all the proper parties until the contrary is shown, even in cases where the finding on jurisdictional questions may be collaterally attacked.

The assumption of jurisdiction and the entering of a decree or judgment is an adjudication upon the question of notice, without any formal or express declaration to that effect. *Carr v. State, etc.*, 103 Ind. 548; *Cauldwell v. Curry*, 93 Ind. 363; *Board, etc., v. Hall*, 70 Ind. 469. In this case there was an assumption of jurisdiction and a judgment; hence there was an adjudication of jurisdictional questions.

Where a court of general jurisdiction assumes jurisdiction, the existence of all facts necessary to confer jurisdiction are presumed to exist. This was so decided in a case precisely like this, *Albertson v. State, ex rel., supra*, and that decision is supported by many cases. The rule upon this subject is thus stated in *Shumway v. Stillman*, 4 Cow. 194: "Every presumption is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it; and will be held conclusive, until clearly and explicitly disproved." Substantially the same rule is declared in *Mills v. Martin*, 19 Johnson, 733, *Thomas v. Robinson*, 3 Wend. 267, *Peacock v. Bell*, 1 Saunders, 73, *Granger v. Clark*, 22 Me. 128, *Vandyke v. Bastedo*, 3 Green, 224, *Weed v. Morrow, supra*, and in the numerous cases cited in 1 Smith's Leading Cases (8th ed.) 1105. There are many cases in our reports affirming a like doctrine. *Horner v. Doe*, 1 Ind. 130; *Waltz v. Borroway*, 25 Ind. 380; *Dwiggins v. Cook*, 71 Ind. 579; *Davidson v. Koehler*, 76 Ind. 398, see authorities cited p. 421.

It is necessary that a petition should be filed invoking the jurisdiction of the court, but when this is done the presumption will be in favor of its jurisdiction, and it is not neces-

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sary to aver facts showing jurisdiction. In so far as *Shaw v. State, etc.*, 97 Ind. 23, declares this doctrine it is authoritative, but there are some statements in the opinion not necessary to the decision of the questions before the court, which can not be deemed authority. All that was necessary to decide in that case, and all that was really decided, is, that there must be a petition calling into exercise the jurisdiction of the court.

Judgment affirmed.

Filed Dec. 15, 1885; petition for a rehearing overruled March 13, 1886.

No. 11,506.

JOHNSON v. BREEDLOVE, ADMINISTRATOR, ET AL.

PLEADING.—Payment.—An answer alleging payment in full of the claim sued on is good on demurrer, although pleaded with other matter which is improper.

SAME.—Sufficiency of Plea of Payment.—In a plea of payment, it is sufficient to allege payment generally, without stating the amount paid, the date of payment or the person to whom made.

SAME.—Payment by Administrator.—Application of Money.—Principal and Surety.—An answer by one claiming to be surety only, that the plaintiff had been fully paid by money received from the estate of the principal debtor, and with the administrator's consent, sufficiently shows that the administrator agreed that the money so received should be so applied.

PRACTICE.—Venire de Novo.—Where the answer of one of several defendants tenders an issue which, if found in his favor, is conclusive against the plaintiff as to all, and a general verdict for such defendant alone is returned, a *venire de novo* will not be granted, notwithstanding there are issues with the other defendants upon which no finding is made.

SAME.—Harmless Error.—An "answer" to a motion for a *venire de novo* is unknown to the practice, and when made should be stricken out, but a failure to strike it out is not available to reverse the judgment where no harm resulted.

SUPREME COURT.—Instructions to Jury.—Where the evidence is not in the

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record, the Supreme Court will not reverse a judgment on account of instructions given to the jury, unless they are so radically wrong as not to apply to any supposed case which might have been made by the evidence.

From the Marion Superior Court.

T. E. Johnson, for appellant.

HAMMOND, J.—This case was in this court once before, and is reported in 72 Ind. 368. The plaintiff in the court below was then, as he is now, the appellant. There has been no change in the complaint, and from the reported case, we take the following statement of its averments:

“On July 3d, 1873, Benjamin F. Johnson, then in life, and Jesse B. Johnson made their promissory note, payable to the order of William H. Henschen, at a named bank at Indianapolis, sixty days from date, for the sum of \$300. This note was endorsed by the payee, Henschen, followed by the appellant, Thomas E. Johnson, and James M. Bradshaw. When the note became due, neither the makers nor the other endorsers paid the same, or any part of it. Thereupon the plaintiff paid \$100 of the principal of the note and the interest due; and for the residue thereof, and in renewal of said note to the amount of \$200, said Jesse B. Johnson executed a like note for \$200, which was endorsed in like manner as the first. When the note thus given in renewal became due, neither the maker nor other endorsers paying the same, the plaintiff paid \$100 upon it and the interest due, and, in renewal of the residue, said Jesse B. Johnson executed another like note for the sum of \$100, which was endorsed in like manner as the two others. When the last mentioned note became due, neither the maker nor other endorsers paying the same, the plaintiff paid it in full and took it up. Neither the maker nor endorsers have paid the plaintiff anything on account of the notes, though the amount is due and unpaid. Copies of the notes and endorsements are set out.”

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The judgment of the court below was reversed on account of the insufficiency of the second and third paragraphs of the answer of the appellee Jesse B. Johnson. When the case was remanded to the court below, said appellee filed an amended and substituted answer in five paragraphs, to the first, second and fifth of which the appellant unsuccessfully demurred. A reply was filed in two paragraphs, to the second of which a demurrer was sustained. The appellee Jesse B. Johnson also filed a cross-complaint against the plaintiff and the defendant Henschen, alleging that the \$300 loan was for the sole benefit of Benjamin F. Johnson; that said appellee was only surety, and that the plaintiff and Henschen were co-sureties, and praying the judgment of the court whether he was liable for anything more than contribution as co-surety. The plaintiff and Henschen each answered the cross-complaint by a general denial. The defendant Henschen also filed an answer to the complaint, claiming that he was only an accommodation endorser of said notes for Benjamin F. Johnson and the appellee Jesse B. Johnson, who he alleged were primarily liable, and asking that their property should be first exhausted by execution before a levy should be made upon his. To this there was a reply in denial. There was a trial by jury and a verdict returned as follows: "We, the jury, find for the defendant Jesse B. Johnson." The appellant filed his motion in writing for a *venire de novo* on the ground that the verdict was imperfect, because it made no finding as to the issues made by the answer of Henschen and the cross-complaint of the appellee Jesse B. Johnson. To this motion said Jesse B. Johnson filed what is called an answer, which the court refused to strike out, and overruled the motion for a *venire de novo*. Judgment was rendered upon the verdict, over the appellant's motion for a new trial.

It is claimed there was error in overruling the appellant's demurrer to the first, second and fifth paragraphs of Jesse B. Johnson's answer; in sustaining the demurrer to the second

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paragraph of the reply; in refusing to strike out the "answer" to the motion for a *venire de novo*; in overruling that motion; and in overruling the motion for a new trial.

The first paragraph of Jesse B. Johnson's answer contained much matter, which was mere evidence, which tended to show that appellant's claim had been fully paid, and which ought to have been struck out, as correct pleading requires the statement of facts, rather than the evidence which goes to establish the facts. But, as the first paragraph of answer contained the averment, "And the defendant says that said notes were all fully paid before this suit was begun," it was, we think, good as a plea of payment, and there was no error in overruling the demurrer to it.

The second paragraph of the answer alleges that all the notes mentioned in the complaint were paid by Benjamin F. Johnson's administrator before the commencement of the action.

It is objected to this paragraph that it does not allege that the payment was made to the plaintiff. But it has been decided that in a plea of this kind it is sufficient to allege payment generally, without stating the amount paid, the date of payment, or the person to whom payment was made. *Demuth v. Daggy*, 26 Ind. 341; *Wolcott v. Ensign*, 53 Ind. 70; *Cranor v. Winters*, 75 Ind. 301; *State, ex rel., v. Early*, 81 Ind. 540; 1 Works Pr., section 595.

The fifth paragraph of answer is as follows: "And for fifth answer to the complaint this defendant says that before the commencement of this action the plaintiff's claim had been fully paid and satisfied by moneys received by him from the assets of the estate of Benjamin F. Johnson, deceased, the principal debtor, for whom this defendant signed said notes as surety only, and by and with the knowledge of Thomas J. Breedlove, the administrator of said estate."

The objection urged against this paragraph is that it does not allege that the administrator of Benjamin F. Johnson's estate *agreed* that the moneys received by the plaintiff from

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said estate should be applied to the payment of the claim sued upon. But it does aver that the plaintiff's claim was paid with moneys received from said estate, with the administrator's consent. This quite fully meets the appellant's objection.

The first, second and fifth paragraphs of the answer were good, and the demurrer thereto was properly overruled.

As to the second paragraph of his reply, the appellant says in his brief: "If the answer were sufficient, we should say that the reply was bad, but we regard it as a good enough reply to a bad answer." Under this statement, as we have held the answer to be sufficient, it is not necessary further to speak of the reply.

There was no error in overruling the motion for a *venire de novo*. By the answer of Jesse B. Johnson it was claimed that the plaintiff's demand had been fully paid before the commencement of the action. The general verdict of the jury decided the issue thus made in favor of Jesse B. Johnson. When this was done there was nothing further in the case to decide. The questions of suretyship raised by the cross complaint and other pleadings were unimportant after the jury reached the conclusion that the plaintiff's claim had been extinguished by payment.

The ruling on the motion for a *venire de novo* was correct without reference to the "answer" thereto which the court refused to strike out. It should have been struck out, as such an answer is unknown to the practice; but as neither the answer nor the court's refusal to strike it out could possibly have resulted in any harm, it is manifest that we can not, on account of such refusal to strike out, reverse the judgment. R. S. 1881, section 658.

The grounds upon which appellant asked for a new trial were, that the verdict was contrary to, and not sustained by, sufficient evidence, and that the court erred in giving to the jury instructions numbered from one to twelve, both inclusive.

The evidence not being in the record, we can not say

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whether the verdict was, or was not, sustained or contrary thereto. Nor can we for the same reason hold that the instructions, or any of them, were improperly given. The rule is well settled that where the evidence is not in the record, this court will not reverse a judgment on account of instructions given to the jury unless they are so radically wrong as not to apply to any supposed case which might have been made by the evidence. *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Rozell v. City of Anderson*, 91 Ind. 591. Under this rule the instructions complained of do not appear to be objectionable.

We find no error authorizing a reversal of the judgment. Affirmed, with costs.

Filed Dec. 13, 1884; petition for a rehearing overruled Jan. 8, 1886.

104	526
121	53
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137	390
138	108
104	526
143	57
143	197
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144	454
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147	648
104	526
150	401
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167	340
167	341

No. 11,761.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO RAILWAY COMPANY v. GAINES.

PLEADING.—*Complaint Charging Negligence.*—*Motion to Make More Specific.*—

Practice.—An objection that the averments of a complaint charging negligence are not sufficiently specific, must be taken by a motion to make more specific. It is not a cause for demurrer.

RAILROAD.—*Action for Personal Injury.*—*Negligence.*—*Contributory Negligence.*—*Pleading.*—A complaint against a railroad company, alleging that the defendant's train approached a highway crossing without giving the required statutory signals and without the plaintiff's knowledge, whereby his team was frightened and ran away, and the plaintiff, without any fault on his part, was injured, sufficiently rebuts any presumption of contributory negligence.

SAME.—*Highway Crossing.*—*Sounding Whistle.*—*Injury by Frightened Team.*—

Where a railroad track crosses a highway by an overhead bridge and the plaintiff's team passing beneath, without the knowledge of those in charge of the train passing above, is frightened by the sounding of the whistle and runs away, whereby the plaintiff is injured, the company,

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in the absence of any showing that the whistling was unnecessary, is not liable, although the crossing was known to be one of extraordinary danger.

SAME.—*Sounding Whistle at Place of Extraordinary Danger not Negligence Per Se.—Burden of Proof.*—The mere sounding of a locomotive whistle, even at a place of extraordinary danger, where teams are likely to be frightened thereby, is not of itself negligence, and to justify an inference of negligence from such act the party having the burden of the issue must show that it was done under such circumstances as made it at that time negligent.

SPECIAL FINDING.—*Silence as to Material Fact.—Presumption.*—Where a special finding is silent as to a fact, the existence of which is necessary to make out the plaintiff's case, the presumption will be that such fact did not exist.

SUPREME COURT.—*Unavailable Error.—Practice.*—Where it affirmatively appears that the judgment rests on a good paragraph of complaint, it will not be reversed because of an error in overruling a demurrer to a bad paragraph.

From the Tippecanoe Circuit Court.

J. R. Coffroth and *T. A. Stuart*, for appellant.

B. W. Langdon and *T. F. Gaylord*, for appellee.

MITCHELL, J.—This action was brought by John W. Gaines against the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, and another railway company, whose line the appellant was operating, to recover for injuries alleged to have been sustained by the plaintiff in consequence of the careless and negligent running of a train by the appellant, and in failing to observe the statutory obligation imposed on those operating locomotive engines on railways, in respect of the approach to highway crossings.

The complaint is in two paragraphs. The first seeks a recovery for an injury upon the common law liability for negligence; while the second is grounded upon the right to recover for an injury occasioned by a failure to observe a statutory duty.

The wrong of which complaint is made in the first paragraph is, that while the plaintiff, with his team and wagon, was lawfully proceeding along a public highway or street,

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where it approaches and is crossed by the defendant's railway, the defendant carelessly and negligently caused a locomotive engine, with a train of cars attached, to approach and pass over the crossing, and that, by reason thereof, the plaintiff's team, without fault on his part, or that of his servant who was driving, took fright, became unmanageable, and ran away with the wagon, from which he was thrown with such violence that he sustained grievous injury to his person.

In the second paragraph it is charged that the plaintiff was proceeding along the highway in the manner stated, when the defendant caused a locomotive engine, with a train of cars attached, to approach the street crossing without sounding the whistle and ringing the bell, according to the statute in such cases made and provided, by reason whereof both plaintiff, and his servant who was driving, were unaware of the approach of the train; that the team took fright, became unmanageable, etc., and the plaintiff was, without fault, injured as stated.

It is contended that neither paragraph states a cause of action, and that the court committed error in overruling demurrers filed to each.

The only infirmity which is claimed, as pertaining to the first paragraph, is, that it fails to specify in what the defendant's carelessness and negligence consisted.

While the statements in the paragraph under consideration are, as was said in *City of Evansville v. Worthington*, 97 Ind. 282, too general to commend it as a model of good pleading, it is nevertheless settled that objection for that cause can only be taken by a motion to make more specific; it is not ground for demurrer. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160.

Concerning the second paragraph it is sufficient to say that while we concede the proposition as contended for by counsel, that a statute which requires certain signals to be given as a train approaches a highway crossing, and which makes a

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railway company liable for all damages occasioned by a failure to give such signals, has no application to a case where the person injured was guilty of contributory negligence, we are nevertheless of the opinion that the averments of this paragraph are such as to rebut any presumption of contributory fault. Moreover, we think the contention of the appellee that the special findings affirmatively show that the conclusions of law and judgment of the court rest on the first paragraph of the complaint is well made. In that view of the case a reversal would not follow, even if it should have been held that the second paragraph was insufficient. *Martin v. Cauble*, 72 Ind. 67; *Smith v. McKean*, 99 Ind. 101.

Upon request the court found the facts specially, and stated its conclusions of law thereon. The manner in which the track crosses the highway, the cautionary signs provided, the speed at which trains usually run in crossing, and the situation and conformation of the grounds surrounding the crossing and approaches to it, are exhibited in detail in the findings.

It was found that the crossing was one that was much used by the passing teams and vehicles, was of extraordinary danger, that accidents had frequently happened there before within the defendant's knowledge, and that the usual statutory signals were not always sufficient warning to notify the public using the highway of the approach of trains. The railway track crossed the highway by an overhead bridge, fifteen feet above the highway, the passage way for teams underneath being a space about twelve feet in width.

Trains approaching from the west were not visible to persons on the highway coming from the north, except at a point about one hundred and eighty feet distant from the crossing, and not then until such trains reached a point not farther than forty feet from the bridge. The "whistling post" for trains approaching from the west was a fraction over thirteen hundred and thirty feet westerly from the crossing. On the 20th day of October, 1882, the plaintiff,

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with his two sons, was returning from the city of Lafayette to his home, seated in a farm wagon, which was drawn by a mule team driven by one of the sons. The team approached the crossing from the north-east upon a slow trot, the wagon making considerable noise, the plaintiff being at the time engaged in conversation with a neighbor who had been invited to a seat in the wagon. The wind was blowing moderately from the south-west, and the weather was clear and pleasant. It was about 4 o'clock P. M. It is found that under ordinary conditions the sound of the whistle on an engine could be heard from a point over a half mile west of the crossing, and the ringing of the bell, the roar and noise of the train coming over the track, could be heard a quarter of a mile distant. At a point from one hundred and eighty to one hundred and eighty-five feet from the crossing the team was stopped for the space of a few seconds for the purpose of looking and listening for the train, the plaintiff knowing that it was about time for the arrival of the regular passenger train, which was three or four minutes late. The occupants of the wagon hearing no signal or other indication of an approaching engine and train, the driver, by direction of the plaintiff, whipped the team into a brisk trot and passed to the railroad crossing at the rate of about six miles an hour. This is found by the court to have been a proper rate of speed under the circumstances. While the plaintiff was thus occupied, an engine with a passenger train attached was coming from the west, over the defendant's line, at the rate of about eighteen miles an hour. When the engine arrived at the whistling post the engineer gave one "long blast" from the whistle, lasting five or six seconds, the fireman at the same time ringing the bell, which was rung continuously until the crossing was passed. The team and the engine reached the crossing about the same time, and while the wagon was under the bridge, and the engine passing above, the whistle on the engine was sounded, the persons in charge of the engine being unable to see teams when so near

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as plaintiff was, and having no knowledge of the presence of the passing team below. It is found that the mules were frightened by the sound of the whistle, the noise and smoke of the train, and that this was the sole cause of their fright. They became unmanageable, ran away with the wagon, which was overturned and the plaintiff thrown upon the ground with such violence as to sustain grievous and permanent injury in his person. The extent, nature and severity of the injury are described. Concluding its finding of facts, the substance of which is above set out, the court makes an inference of fact as follows:

"And it is further found as an inference of fact that said plaintiff received and suffered said injuries without any fault or negligence on his part or on the part of his son who was driving said team at the time said injuries were received, and that the defendant, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, was guilty of negligence in running its said engine and train of cars over said crossing over said highway, and thereby negligently frightened the team of the plaintiff and thereby caused the said injuries to the plaintiff."

The conclusion of law stated as to the appellee is as follows: "And I further find that the defendant, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, is liable upon the facts hereinbefore found, and therefore I find for the plaintiff, and against said defendant, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, and assess the plaintiff's damages at eight thousand dollars."

The appellant excepted to the conclusions of law, upon the facts found, and upon this exception is presented the first question for consideration: Do the facts found justify the inference that the railway company was guilty of negligence? The case is in some respects different from that ordinarily presented in which the conduct of persons operating railway trains, and persons travelling over grade crossings on public highways are involved. Since the railway here concerned crossed

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over the highway on its own bridge, so as to present no obstruction against the use of the highway, those operating trains over it were required to observe precisely the same care in doing so in respect of travellers on the highway at the crossing that was required at other places of equal danger. The single exception to this was, that the statute imposed upon those operating trains the duty of giving timely warning of the approach of engines by specified signals. The signals having been duly made, so that no negligence was predicated upon a failure to comply with its duty in that regard, the conduct of the appellant, as it is exhibited in the special findings, must be considered in all respects the same as if the highway along which the plaintiff was proceeding had lain parallel with, and in such close proximity to, the railway as to have presented a situation of extraordinary danger. Whether it was negligent or not must depend upon the conduct of those operating its train, considered with reference to the danger incident to the situation, and the facts of which they had or were bound to take notice.

The only substantive act upon which negligence is predicated is, that when the locomotive entered upon the bridge the whistle was sounded. It is not found that the sounding of the whistle was unnecessary or in any respect improper, and we must, therefore, presume there was lawful occasion for it. It is expressly found that those in control of the engine had no knowledge of the presence of the plaintiff or of his team, and the facts found show that in the situation in which they were, no reasonable diligence would have discovered them to the persons operating the train. It is also specifically found that the sole cause of the fright of the team was the sounding of the whistle and the noise and smoke of the train.

That the appellant was in the exercise of a lawful right in crossing its train over the bridge is not disputed. That the entrance of the locomotive upon the bridge under which the plaintiff was passing was attended with noise and smoke, was of course unavoidable, and thus the rule which requires

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us, in the absence of a finding to the contrary, to indulge the presumption that the sounding of the whistle was, from some cause, a proper and necessary thing to be done, results in the conclusion that the team was frightened from causes that were unavoidable and conduct that was necessary and proper. Unless, therefore, it can be held that, because the place at which the whistle was sounded was one of extraordinary danger, the mere fact that it was sounded without regard to the occasion for so doing, was negligence *per se*, the fact of negligence, inferred by the learned judge who tried the cause, would seem to be without support.

Upon well settled principles and upon the authority of cases forming a class to which this is allied, we think an inference of negligence can not be justified on the hypothesis stated. That the juncture of affairs at the point where the accident happened produced a situation of extraordinary danger, was not blamable to the appellant; that there are such places is one of the necessary incidents to the existence and operation of railways; that such a place existed did not affect either the right of the railway to use its line in any lawful manner, or of the plaintiff to proceed along the highway. Each, however, was under the obligation so to use its own as not unnecessarily to interfere with the rights of the other. Courts take judicial knowledge of the fact that sounding the whistle is, under a variety of circumstances, a necessity. The statute requires it upon the approach of trains to all highways. It is a means of warning persons or animals off the track, and thus, perhaps, saving car loads of passengers from disaster. The danger to persons on an adjacent or intersecting highway must be known and imminent in order to excuse the giving of signals required by law, or which might be necessary to clear its track from trespassing animals, where there was a probability that they might by contact derail the train. On the other hand, if there was no occasion for blowing the whistle or making any other noise than that necessarily incident to the running of its train at a place where it

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might reasonably be supposed that some one who could not be seen might be using a highway so situate as to make its use dangerous, sounding the whistle or making any other unnecessary noise might be the grossest negligence, and if a person on the highway was seen by those in charge of the engine, and the unnecessary sounding of the whistle might put him in peril, such conduct as that supposed 'might be little less than wanton and malicious. But upon the facts as found, we can not know but that the engine was approaching another street crossing, and that the signal given was made in pursuance of the defendant's statutory duty, or it may have been necessary in order to clear the track of trespassing animals or to warn some one of the approach of the train. "The mere sounding of the whistle can not be deemed negligence, although blown in close proximity to the highway, and even though there are horses in the immediate vicinity." *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230).

In a case involving the principles we are considering it was said: "It can not be questioned that defendant's train was rightfully on its track, and that the blowing of a whistle, and the letting off of steam with its attendant noise, are not *per se* acts of negligence, or evidence of wrongful conduct." *Culp v. Atchison, etc., R. R. Co.*, 17 Kan. 475. If the servants of the defendant were guilty of no improper conduct while exercising a lawful right, the fact that the plaintiff's team took fright at the sound of the whistle, the noise and smoke of the train, can not make it liable. The liability, if any exists, must rest upon some heedless or unnecessary act which was likely to and did produce the fright of the team.

In the case of *Philadelphia, etc., R. R. Co. v. Stinger*, 78 Pa. St. 219, which is similar in many respects to the case under consideration, it is said, "the mere fact of whistling furnishes no presumption of negligence." So in the case of *Favor v. Boston, etc., R. R. Co.*, 114 Mass. 350 (19 Am. R.

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364.) Speaking of the obligation of railroad companies, under circumstances such as we are here considering, the court said: "It has the right to do lawful acts upon its own premises, and it is not responsible for injurious consequences that may arise from such acts, unless the acts are negligently and improperly done. If the defendants in this case had done some negligent act in the immediate vicinity of the highway, calculated to endanger the safety of travelers passing over it with horses, a very different question would have been presented."

We may say in this case, since it was found that the place was one of extraordinary danger, at which accidents were known to have occurred before, if it had been found that the team was frightened by the unnecessary or improper sounding of the whistle, a very different question would have been presented.

The plaintiff relies on the case of *Hill v. Portland, etc., R. R. Co.*, 55 Me. 438. In that case the engineer was in a situation to see the plaintiff and his horse before he sounded the whistle. Being so situate he sounded the whistle twice, that being the usual signal for the train to start. The court held that the signals thus given, although customary, were unnecessary.

The case of the *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259, which is also relied on, does not support the appellee's contention. The railway company, in that case, was held liable because it approached a dangerous crossing without giving any warning. This was held to be negligence.

The statement in the last paragraph that the railway company "was guilty of negligence in running said engine and train over said crossing over said highway, and thereby negligently frightened the team," adds no force to the finding of facts. This is but a conclusion, and must rest for its support on the facts found. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186.

It results that upon the facts found by the court the infer-

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ence that the defendant was negligent was not justified, and the conclusion of law should have been that the plaintiff was not guilty of negligence.

The judgment of the court is reversed with costs, with instructions to the court below to state conclusions of law on the facts found in accordance with this opinion, and to render judgment accordingly.

Filed Dec. 29, 1885.

• ON PETITION FOR A REHEARING.

MITCHELL, J.—The argument of the learned counsel in support of the petition for a rehearing is directed to the maintenance of two propositions: *First*. That the court erred in assuming, in the principal opinion, that the special findings predicated no negligence upon the failure of the railroad company to comply with its statutory duty, as charged in the second paragraph of the complaint. *Second*. That we are in error in holding, in the absence of any finding to the contrary, that the presumption must be indulged that sounding the whistle by the engineer was in pursuance of some occasion rendering such conduct proper and necessary.

Respecting the first proposition, a careful re-examination of the special findings confirms us in the opinion that the liability of the defendant was not predicated upon the failure of the defendant to execute the signals required by law.

While the findings show that the signals were not given in exact conformity with the very letter of the statute, there appears to have been a substantial compliance with the law. Besides, there is no possible connection, near or remote, between the injury and the failure to give the signals in literal compliance with the statute, instead of the manner in which warning of the approaching train was given.

The finding is, that one "long blast," lasting five or six seconds, was given. The signal prescribed is, three distinct sounds of the whistle. The purpose in requiring signals is to give warning of the approach of trains. One "long

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blast" occupied more time than would have been required to give double the number of distinct sounds prescribed by the statute. It probably made double the amount of noise. It could hardly be said, if six, instead of three, distinct blasts of the whistle had been given, that there was a failure to give the necessary warning by signalling the approach of the train.

The statutory warning must be given. If more than the statute requires is given, the railroad company may be liable to some one who is injured by the excess, but not for a failure to give the signals.

Upon the former hearing this second paragraph of the complaint, which it is now claimed the special finding supports, was subjected to criticism by opposing counsel as not being sufficient on demurrer. It was then said by counsel, who now insist that we fell into error in assuming that the special findings predicated no negligence on the failure to give the signals as charged in the second paragraph, that "the overruling of the demurrer to this paragraph, if erroneous, has become, by the events of the trial, immaterial and harmless, because the finding of the court is on the first paragraph." Counsel then proceeded in their argument to demonstrate the proposition above stated, and closed the discussion of this subject with the following pertinent and emphatic assertion: "The language of the learned judge who drew the finding is so explicit that there is no room for even a captious reader to doubt that the finding is bottomed wholly on the negligence of the appellant, as set forth in the first paragraph, as contradistinguished from the liability for a failure to comply with the statute."

Our own examination of the special findings, coupled with the vigorous argument of counsel, induced us to accept the view thus forcibly urged. Assuming that counsel have, for sufficient reasons to themselves, arrived at a different conclusion, our opinion in respect of the matter, nevertheless, is—

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barring the imputation of captiousness—well expressed by the language quoted from their original brief.

As respects the second proposition, it is now contended, the special findings being silent upon the subject of the necessity or propriety of sounding the whistle when the engine came upon the bridge, which was in part the occasion of the fright of plaintiff's team, that the conclusion must be that it was unnecessarily and improperly sounded.

The action having been brought to recover damages for alleged negligence, it is of course not disputed that the burden of proving negligence was on the plaintiff. Nor is it claimed, as indeed upon reason and authority it could not be, that the mere sounding of the locomotive whistle is, ordinarily, negligence *per se*. The argument is, that because it is found that the whistle was sounded at a place of extraordinary danger, where teams were likely to be passing, and because the act of sounding it was likely to give fright to passing teams, therefore it must be presumed, from the mere finding that it was sounded, that it was wrongfully and negligently done.

At the former hearing we sought to maintain the proposition that because sounding the whistle was, under some circumstances, absolutely enjoined as a statutory requirement, and because the courts took judicial knowledge of the fact that, under other circumstances, it was an indispensable necessity to the running of trains, therefore the mere fact that the whistle was sounded was not of itself negligence. Unless it can be maintained that it was, the argument is at an end. If the act which the court finds contributed to the injury was not *per se* negligent, that is, was negligent or not, depending on whether there was a necessity for doing it, manifestly before an inference of negligence can arise from the mere doing of the act, it was incumbent on the party having the burden of the issue to show that the act was done under such circumstances as made it at that time negligent.

Where a special finding is silent as to a fact, the existence

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of which is necessary to make out the plaintiff's case, the presumption will be the fact did not exist. This rule has been so often stated that we need not cite authorities in its support. To sustain the plaintiff's case, it was incumbent on him to prove that the defendant was guilty of negligence. The proof, as we must assume, went to such an extent as to enable the court to find nothing more than that the defendant did that for which, under some circumstances, the law imposes a penalty against its servants if the act which was done is omitted, besides making the company liable for all damages which result from its omission. Under other circumstances the court knows judicially that an indispensable necessity may require the doing of the act; whether doing the act was negligent or not depended upon the presence or absence of the conditions which, under pains and penalties, required it to be done, or the existence of any of the numerous circumstances which may have rendered it of the highest public concern that it should have been done. Upon these subjects the evidence was such, we must assume, that the court was unable to find one way or the other. Now it is insisted that because the place was one of extraordinary danger and the act done was one which was likely to produce injury, the court must assume from the mere doing of the act, that it was improperly and unnecessarily done.

This, beyond question, would be the rule in case sounding the whistle on the locomotive while in rapid motion was something which the engineer might always do or omit at his pleasure, without regard to time or place. The case would then be within the rule, that "where a person is doing a voluntary act, which he is under no obligation to do, he is held answerable for any injury which may happen to another, either by carelessness or accident." *Vincent v. Stinehour*, 7 Vt. 62. *Underwood v. Hewson*, Strange, 596. This principle distinguishes all the cases which the learned counsel have cited in support of their petition.

There is neither legal requirement nor other necessity that

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we know of that live coals of fire should, under any circumstances, be dropped from an elevated railroad in such manner as that they may fall upon those passing beneath, along a public street, as was the case in *Lowery v. Manhattan R. W. Co.*, 99 N. Y. 158 (52 Am. R. 12). So with the blowing off of steam from an engine. The law fixes no time nor place, when and where, this is to be done, and courts can have no such knowledge of the necessity for so doing, as that it can be said, as a matter of judicial knowledge, that the act must be done at the very moment an emergency arises, as in the case of sounding a whistle. The doing of such an act, without explanation, at a time when and place where there is a high degree of probability that it will produce hurt to others, may well be held to be negligence. The reason is, the person in charge of the engine, presumptively, might have selected another time and place for the act. Where, however, an act is done, in the progress of a business, which customarily is only performed in pursuance of a legal duty or public necessity, it will not be presumed, from the mere doing of the act, that it was unnecessarily or wrongfully done.

The distinction is precisely that which governs in a case where one who is under no obligation to do so, voluntarily handles a fire-arm in such manner that it is discharged to the hurt of another, and the case of a soldier who, while in exercise, hurts another by the discharge of his piece. In the one case, civil liability attaches, regardless of whether the injury occurred through carelessness or misfortune; in the other, only when the act was done wrongfully or carelessly.

It is as much a requirement of the law that an engine shall be provided with a whistle, and that it shall be blown as occasion may require, as that a soldier shall carry a gun, and that he shall exercise when commanded, and for the same reason that the law will not presume negligence against the soldier when hurt results from the use of that which the law required him to use, it will not presume negligence against the railroad company because it used that which the

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law compelled it to use. The engineer may not, to any degree whatever, wait his convenience, or select the place at which the whistle is to be sounded. When certain points are reached, or the emergency arises, the duty is imperative at that moment. Public safety is in many ways involved in the prompt discharge of this duty. We can not put the engineer under the pressure of a rule which shall hold him responsible for failing to sound the whistle on all proper occasions, and at the same time indulge a presumption against him and the railway company, when the whistle is sounded at a place of extraordinary danger, that it was wrongful and unnecessary.

It is no hardship to require of him who asserts that it was wrongful and unnecessary, to produce such a state of facts as will at least enable the court to find something beyond the mere fact that the whistle was sounded.

The petition for a rehearing is overruled.

Filed March 24, 1886.

No. 12,764.

THE STATE v. BOSWELL.

CONSTITUTIONAL LAW.—*Applicability of Federal Constitution to the States.*—

The provisions of the Federal Constitution do not apply to the States, unless the States are referred to therein by express words or clear implication, and prosecutions by the State for felonies are not governed by provisions of the Constitution of the United States.

SAME.—*Criminal Law.—Prosecution by Information.*—There is nothing in the Federal Constitution, or any of the amendments thereto, which prohibits the States from proceeding in felony cases by information when that procedure is authorized by the State Constitution.

CRIMINAL LAW.—*Prosecutions for Felony.—Indictment.—Information.*—Prosecutions for felony must be by indictment, except in the cases where the statute expressly provides that they may be by information, and such statute must be strictly construed.

104	541
125	371
104	541
144	431

104	541
160	384
104	541
e166	589

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SAME.—*Grand Jury.*—*Failure to Return Indictment.*—*Effect of.*—Where a person accused of crime has been recognized to appear at the following term of court, and where the grand jury sitting at that term fails to find an indictment against him, a subsequent prosecution by information is unauthorized and not allowed.

SAME.—The failure of a grand jury to find an indictment against one accused of crime, and recognized to appear at that term of court, does not necessarily work an acquittal, nor does it prevent his being placed under recognizance, in a second preliminary examination, where he has been arrested on a subsequent affidavit made by a competent person.

From the Huntington Circuit Court.

E. C. Vaughn, Prosecuting Attorney, *B. M. Cobb*, *C. W. Watkins* and *J. G. Ibach*, for the State.

J. B. Kenner, *J. I. Dille* and *D. Turpie*, for appellee.

ELLIOTT, J.—The first question which the record presents is: Can the State in any case proceed by information against a person accused of a felony, or must the proceeding be by indictment?

It is assumed in the argument of appellee's counsel, that the provisions of the Federal Constitution respecting the presentment of charges of felony and the mode of trial, apply to prosecutions under the laws of the State, and prohibit prosecutions by information. This assumption can not be made good. The Federal and State courts, without diversity of opinion, have long held that the provisions of the Federal Constitution do not apply to the States, unless the States are referred to by clear implication or express words. The law upon this point is settled, and has long been settled. *Barron v. Mayor, etc.*, 7 Peters, 243 (32 U. S. 243, n.); *Fox v. State*, 5 How. 410; *Twitchell v. Commonwealth*, 7 Wall. 321; *Pearson v. Yewdall*, 95 U. S. 294; *Edwards v. Elliott*, 21 Wall. 532; *Baker v. Gordon*, 23 Ind. 204; *Butler v. State*, 97 Ind. 378; *Cooley Const. Lim.* (5th ed.), 26.

Where the States are named, the provisions thus directly made applicable to them control in State as well as National affairs, but it is otherwise where the States are not named.

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Kring v. Missouri, 107 U. S. 221; *Tennessee v. Davis*, 100 U. S. 257; *Campbell v. Dwiggins*, 83 Ind. 473, 481.

It is quite clear that the people of Indiana did not understand that the Constitution of the United States governed prosecutions by the State for felonies, for they provided in their Constitution that the grand jury system might be modified or abolished, and our court as early, at least, as 1857, declared that the Federal Constitution did not govern the States except in those instances where they were named. *Lake Erie, etc., R. R. Co. v. Heath*, 9 Ind. 558, see p. 559.

The fourteenth amendment to the United States Constitution does name the States, and its provisions are, therefore, applicable to them. *Kring v. Missouri, supra*; *Tennessee v. Davis, supra*. That amendment does prohibit the States from depriving "any person of life, liberty or property without due process of law," but it does not prohibit the States from proceeding in felony cases by information when that procedure is authorized by the State Constitution. This question has recently been discussed by the Supreme Court of the United States, and needs no further discussion from us. *Hurtado v. California*, 110 U. S. 516; *Kallock v. Superior Court*, 56 Cal. 229; *People v. Hurtado*, 63 Cal. 288; *Rowan v. State*, 30 Wis. 129 (11 Am. R. 559); *State v. Barnett*, 3 Kan. 250. There are many cases declaring a general principle which gives full and sure support to the conclusion reached by the courts in the cases cited. *Munn v. Illinois*, 94 U. S. 113; *Walker v. Sauvinet*, 92 U. S. 90; *Kennard v. Louisiana*, 92 U. S. 480; *Davidson v. New Orleans*, 96 U. S. 97; *Missouri v. Lewis*, 101 U. S. 22; *Loan Ass'n v. Topeka*, 20 Wall. 655; *Brown v. Board of Levee Commissioners*, 50 Miss. 468.

It seems clear to us that one who is tried and convicted upon an information provided for by a constitutional State statute is not deprived of his liberty without due process of law, for we perceive no reason for doubting the soundness of the proposition that proceedings founded upon an infor-

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mation provided for by a legally enacted statute do constitute due process of law. Our own decisions have repeatedly sustained the validity of proceedings founded upon informations, and they, therefore, affirm the principle which supports the proposition to which we here declare our assent.

The remaining questions in the case arise upon the ruling of the court on a demurrer addressed by the State to a plea in abatement filed by the defendant. The substance of the plea is this: On the 18th day of July, 1885, an affidavit was filed charging the appellee with the offence of assault and battery with intent to kill. On this charge he was recognized to appear at the ensuing term of the Huntington Circuit Court; that term of court convened on the 26th day of October, 1885, and on that day the grand jury were empanelled and remained in session one week, when they were discharged without having returned an indictment against the appellee, and after the discharge of the grand jury the prosecuting attorney filed the information against the appellee on which this prosecution is founded. The offence charged in the information is the same as that upon which the appellee was recognized to appear at the circuit court, and the information was filed during the term at which the appellee's recognizance required him to appear.

The controlling question in this branch of the case is this: Can an information be rightfully lodged against a defendant at a term of court to which he was recognized to appear, but after the grand jury had been discharged without finding an indictment against him?

A written accusation made by a competent officer or tribunal must be preferred against one brought to trial for a felony, for without such an accusation a prosecution would be in violation of the Federal and State Constitutions, as, in the absence of such an accusation, there could be no due process of law. It is not enough that there is a written accusation, but it must also be one preferred by an officer or tribunal authorized by law to prefer it. A citizen may cause the

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arrest of an accused person upon an affidavit, but the accused can not be put to final trial upon a charge of felony on such an affidavit, although it may authorize a preliminary examination and empower a court to compel the person accused of crime to enter into a recognizance. The ancient method of accusing a man of felony was by an indictment found by a grand jury, and this is still the exclusive method in many jurisdictions, and in ours is the usual but not the exclusive method. While the procedure by indictment is the ordinary one, our Constitution authorizes the employment of another method, and our statute, proceeding upon that authority, provides for the employment of the method of prosecuting by information, but the latter method can only be adopted in the cases provided by statute. Indictment is yet the usual method; that by information is not. It is clear from our statutes and our decisions that prosecutions for felony must be by indictment, except in the cases where the statute expressly provides that they may be by information. The inquiry, therefore, in all cases where the right to proceed by information is properly questioned, must be: Is the case one which the statute authorizes the State to prosecute by information instead of by indictment?

Statutes are to be construed as forming part of one great and uniform system of jurisprudence. *Humphries v. Davis*, 100 Ind. 274, 284 (50 Am. R. 788). If construction proceeded upon any other principle, the law of a State would consist of disjointed and inharmonious parts, and conflict and confusion be the result. The light needed for the just interpretation of a statute is not supplied by the statute itself, but comes from other statutes and from the principles declared by the courts of the land. It would be as illogical as mischievous to act upon a single statute found in a great body of law irrespective of other statutes and other laws, and against such a course the faces of the courts have been long and firmly set. A court that should undertake to pursue such a course

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would, to borrow something of the language and thought of Mr. Bishop, be quite sure to stumble; it would certainly "go sounding on a dim and perilous way." The section respecting prosecutions by information found in our criminal code must be construed with reference to other statutes, and especially with reference to other parts of that code. It is not isolated and detached provisions of a code that rule; it is the intention of the Legislature, as gathered from all the provisions of the code, that governs and controls.

The prosecution by indictment of persons accused of felony has not only long been the method adopted by our laws and by the laws of the country from which the great principles of our jurisprudence come, but it is a method closely in harmony with the spirit of our institutions, for that spirit is, that in the administration of the criminal law the people shall take as much part as possible; hence it is that grand juries are provided for and the decision of questions of law, as well as of fact, committed to our traverse juries. This has been for many years the policy of our law, and for centuries it has been a firmly settled principle of the common law. Prosecution by information is in derogation of the common law and a departure from the general policy of our laws, and statutes in derogation of the common law, and in opposition to a long settled policy, must be strictly construed. In a note to *United States v. Brady*, 3 Crim. Law Mag. 69, 77, Mr. Wharton makes some very strong objections to the method of prosecuting felonies by information, and, with much clearness, delineates the policy of the law upon the subject of prosecutions for crime. We quote his concluding remarks: "The ordeal of a grand jury is a proper one in all cases of serious crime. It is a terrible thing for a man to be put on trial for an offence involving ignominy and contingent heavy punishment. The expense is heavy; the mere fact of being put on trial is a great discredit; there is always a risk of an unjust conviction. Under these circumstances the protection afforded by a grand jury is just as well as politic." The

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courts, to be sure, have nothing to do with questions of legislative policy, but it is, nevertheless, their duty to look to the general policy of the government in construing statutes, and here we receive light from this source, as well as from the principles of the law and other statutes. It can not be justly held, in view of the policy of our government, the principles of our laws, and the general provisions of our code of criminal laws, that the Legislature meant to authorize a prosecution by information in a case where an accused had been recognized to appear at the term of court following the commission of the offence, and where the grand jury, sitting at that term, had failed to find an indictment against him. To hold otherwise would be, in effect, to permit the prosecutor to sit in judgment on the proceedings of the grand jury, to substitute his opinion for theirs, and to make his will the sole arbiter of the question whether a man whom the grand jury had failed to indict should or should not be forced to final trial. We do not believe that the Legislature intended that this should occur, nor do we believe that they intended that prosecutions by information should supplant prosecutions by indictment, except in particular instances. The provisions made by statute, authorizing prosecutions by information, were intended to secure speedy trials and prevent delays by enabling the prosecuting attorney to present charges upon which the grand jury had no opportunity to act, but they were not intended to permit the prosecuting attorney to proceed by information where there is ample opportunity to proceed by indictment. Where there is an opportunity to present an accusation to the grand jury, the prosecutor can not, upon the failure of that body to return an indictment, proceed against the accused by information. If we were to adopt the theory of the State, it would result in leaving to the almost unrestrained discretion of the prosecuting attorney the method of prosecuting felonies, other than murder or treason, and in confining the procedure by

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indictment to a very small class of cases. This result it was not the intention of the Legislature to produce.

The failure of the grand jury to find an indictment does not, of course, work an acquittal of an accused, nor does it prevent his arrest upon an affidavit made by any person competent to make an ordinary affidavit, nor does it prevent a preliminary examination from being held the second time and an order entered placing him under recognizance, but it does prevent the prosecuting attorney from driving him to final trial upon an information.

Judgment affirmed.

Filed Jan. 29, 1886; petition for a rehearing overruled March 20, 1886.

No. 11,715.

ELMORE v. OVERTON.

COUNTY SUPERINTENDENT.—*Powers of, not Judicial.*—The office of county superintendent belongs to the executive department of the State, and the statute does not confer upon the incumbent either judicial or quasi judicial power in the matter of licensing persons to teach in the common schools.

SAME.—*Liability of.—Discretion as to Issuing License.*—The statute confers upon the county superintendent a discretion on the subject of licensing teachers, which is so far analogous to judicial discretion that he is protected from any claim for damages on account of any mere mistake in his decision, or error in judgment, either in granting or withholding a license.

SAME.—*Maliciously Withholding License.*—A county superintendent is liable in damages for maliciously withholding license to teach from an applicant lawfully entitled to receive the same, and he will be held to have acted maliciously where he acts either from wilful and wicked or from corrupt motives.

SAME.—*Granting and Issuing License.*—There is no legal distinction between the granting of a license to teach, and the act of issuing a certificate of that fact. The terms are convertible, and the "licensing" im-

104	548
127	312
104	548
137	500
138	208
104	548
153	92
104	548
170	486

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plies the issuing to an applicant of a written permission to teach in the public schools.

SAME.—Evidence.—Practice.—In an action against a county superintendent for maliciously withholding a license, oral proof of admissions by the defendant that he had granted a license to the applicant is inadmissible, unless it is first shown that he kept no such record as required by the statute, or that such record was incorrect. The presumption is that he kept a record of his proceedings which would itself be the best evidence.

SAME.—Examination Papers.—Where, in an action against a county superintendent for maliciously withholding license, the defendant is called as a witness for the plaintiff and he is examined as to a part of the examination papers, the other parts having been lost, it is not error to exclude such fragmentary part of such papers from evidence.

From the Montgomery Circuit Court.

E. C. Snyder and W. W. Thornton, for appellant.

T. E. Ballard, M. E. Clodfelter, M. D. White and W. S. Moffett, for appellee.

NIBLACK, C. J.—Action by James Elmore, a person occasionally engaged, and desirous of continuing, in the business of a common school teacher, against John G. Overton, formerly the superintendent of the common schools of Montgomery county, for damages for refusing, while such superintendent, to issue to him a license, as such teacher, after he had, by law, become entitled to receive such a license.

The complaint was in four paragraphs; but a demurrer was sustained to the second paragraph, and, in consequence, it is not in the record.

The first paragraph charged that, notwithstanding the plaintiff had furnished satisfactory evidence of his good moral character, and had passed an examination which entitled him to a license as a teacher in the common schools for the period of twelve months, the defendant unlawfully and maliciously refused to grant and to issue to him a license as a teacher in such schools.

The third paragraph charged that, upon the plaintiff having furnished satisfactory evidence of good moral character, and having passed a successful examination, as alleged in the

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first paragraph, the defendant granted to him a license to teach in the common schools of Montgomery county, but that the defendant had thereafter, wickedly and corruptly, failed and refused to issue to him, the plaintiff, a certificate of the fact that a license, as such teacher, had been so granted to him.

The fourth paragraph was substantially the same as the third, with the additional averment that the defendant had given out and pretended, as a reason for not issuing a certificate of the fact that the plaintiff had been granted a license to teach in the common schools of the county, that he, the plaintiff, was not a man of good moral character, by means of which the plaintiff became greatly scandalized and injured in his business as a teacher in the common schools.

Issue, trial, verdict and judgment for the defendant.

Error is assigned upon the overruling of the plaintiff's motion for a new trial, and by the assignment of cross errors questions are made upon the sufficiency of the first, third and fourth paragraphs of the complaint.

It is well settled, and hence conceded, that a judicial officer is not civilly liable for an erroneous decision, however gross the error may have been, or however bad the motive was which inspired it. Such a liability would be inconsistent with the proper exercise of judicial functions. Besides, other appropriate means are provided for relief against a false or erroneous judgment. *Larr v. State, ex rel.*, 45 Ind. 364; *Kress v. State, ex rel.*, 65 Ind. 106; *State, ex rel., v. Jackson*, 68 Ind. 58; *Halloran v. McCullough*, 68 Ind. 179; *Cooley Torts*, pp. 379, 403; *Stewart v. Cooley*, 23 Am. R. 690; *Busteed v. Parsons*, 25 Am. R. 688; *Rains v. Simpson*, 32 Am. R. 609; *Jones v. Brown*, 37 Am. R. 185; 2 Wait Actions and Defenses, 117.

It is claimed that a county superintendent of common schools, in passing upon the evidence offered in support of the moral character of an applicant for a license as a teacher, as well as in judging of his qualifications and fitness to be-

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come a teacher, acts either judicially, or to such an extent *quasi* judicially as to entitle him to the same immunity against a civil action for an erroneous or false judgment as that enjoyed by a judicial officer.

Section 4424, R. S. 1881, provides for the election of a county superintendent of common schools in each county. Section 4425 prescribes that "Said county superintendent shall examine all applicants for license as teachers of the common schools of the State, by a series of written or printed questions, requiring answers in writing, if he wishes so to do; and, in addition to the said questions and answers in writing, questions may be asked and answered orally; and if, from the ratio of correct answers and other evidences disclosed by the examination, the applicant is found to possess a knowledge which is sufficient in the estimation of the superintendent to enable said applicant to successfully teach, in the common schools of the State, orthography, reading, writing, arithmetic, geography, English grammar, physiology, and the history of the United States, and to govern such schools, said superintendent shall license said applicant for the term of six months, twelve months, eighteen months, or two years, according to the ratio of correct answers and other evidences of qualification given upon said examination, the standard of which shall be fixed by the superintendent. Applicants, before being licensed, shall produce to the superintendent the proper trustee's certificate, or other satisfactory evidence of good moral character: *Provided*, That after an applicant has received two licenses in succession, for two years, in the same county, the superintendent thereof, after the expiration of the last license issued, may renew the same without a re-examination, at his discretion."

As we construe this section of the statute, it does not confer on the county superintendent either judicial or *quasi* judicial power in the matter of licensing persons to teach in the common schools; nor is such superintendent invested with any such power by any other provision of the statute

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having relation to the duties of his office. The office in question belongs to the executive department of the State, and the duties attached to it are, strictly speaking, of a merely administrative character, that is, are in aid of the execution of, and assist in giving force and effect to, other provisions of our common school system. Any attempt, therefore, to confer on such an officer any power essentially judicial would be in derogation of article 3 of the Constitution of our State, which prohibits an officer in the executive department from discharging any duty pertaining to either the legislative or judicial departments of the State government. But we regard the discretion conferred upon the county superintendent on the subject of licensing teachers as being so far analogous to a judicial discretion that he is protected from any claim for damages on account of any mere mistake in his decision, or error in judgment, whether in granting or withholding a license to a person desirous of becoming a qualified teacher in the common schools. In that respect, we think, a county superintendent of schools occupies a similar, and generally analogous, position to that of an inspector of an election, who can not be made responsible for a mere error of judgment in rejecting a ballot offered by a qualified voter, but who may be required to answer in damages for *maliciously* rejecting such a ballot. *Gates v. Neal*, 23 Pick. 308; *Jenkins v. Waldron*, 11 Johns. 114; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Weckerly v. Geyer*, 11 S. & R. 35; *Rail v. Potts*, 8 Humph. 225; *State v. McDonald*, 4 Harrington, 555.

After discussing and approving the doctrine that a judicial officer can not be held pecuniarily responsible for an erroneous decision concerning any matter of which he has jurisdiction, however gross the error, or bad the motive which led to it, Cooley, in his work on Torts, at page 411, says: "But it is an interesting and very important question whether, in the case of that class of officers who do not hold courts, but exercise what may be and often is called power

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quasi judicial, like assessors of lands for taxation, the immunity is not, after all, only partial and limited by good faith and honest purpose. There are certainly many cases which hold, and more which assume, that the law will hold such officers liable if they act maliciously to the prejudice of individuals. Thus, it is said that the members of a school board may be held responsible for the dismissal of a teacher, if they act maliciously and without cause; and a county clerk, for wilfully and maliciously approving an insufficient appeal bond; and a wharfmaster, for the removal of a ship from a certain dock, where it can be shown that the order was given maliciously, and with the purpose to cause injury." In this connection it may be stated that where a public officer acts either from wilful and wicked, or from corrupt motives, he is held to act maliciously. While, therefore, the non-liability of a county superintendent for a mere error in judgment in refusing to grant a license to an applicant who desires to become a teacher is fully conceded, we are of the opinion that he ought to be held liable for *maliciously* withholding a license from an applicant lawfully entitled to receive such a testimonial to his qualifications as a teacher in the common schools.

In coming to this conclusion, we feel that we are supported by the very decisive weight of authority in analogous cases, and are in harmony with the general scope and spirit of article 3 of the Constitution, which divides our State government into three separate and distinct departments. *Gregory v. State, ex rel.*, 94 Ind. 384 (48 Am. R. 162). Consequently, the objections urged against the sufficiency of the several paragraphs of the complaint, now before us, can not be sustained.

At the trial, the plaintiff introduced evidence tending to show that in September, 1882, while the defendant was county superintendent of common schools, he was an applicant for a license as a teacher, and was examined by the defendant as to his qualifications and fitness to receive such a

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license. The plaintiff, also, introduced evidence tending to prove that the ratio of his answers to questions addressed to him at his examination was, as to educational qualifications, high enough to entitle him to receive a license to teach for as much as six months, and possibly for the period of twelve months. It was then proposed by counsel to prove by the plaintiff that a few days after his examination, the defendant told him that he, the defendant, had granted to him, the plaintiff, a license to teach in the common schools; but objection being made upon the ground that, as the defendant was required to keep, and presumably had kept, a record of his proceedings as regards granting, as well as refusing, licenses to applicants, oral evidence was primarily inadmissible to prove either that a license had been granted or had been refused, the proposed proof was excluded.

Section 4428, R. S. 1881, directs that "The county superintendent shall provide a blank-book at the expense of the county, in which he shall keep minutes of his proceedings, and shall deliver said record, and all other books, papers, and property appertaining to his office, to his successor, and take a receipt therefor."

Previous to the offer to prove what the defendant had told the plaintiff, as above set forth, there was no evidence as to whether the defendant had or had not kept minutes of his proceedings while he was county superintendent. In the absence of any evidence on the subject, the presumption was that the defendant had done his duty as to keeping such a record as the law required him to keep. *Evans v. Ashby*, 22 Ind. 15; *Hale v. Talbott*, 86 Ind. 447; *Lawson Presump. Ev.* 53, 61. If a correct record had been made of the defendant's proceedings upon the plaintiff's application for a license, it constituted the best evidence of those proceedings. If an incorrect record, or no record at all, had been made, the fact ought to have been averred preparatory to letting in secondary evidence. As no foundation was laid for the introduc-

tion of secondary evidence, the circuit court did not err in excluding the proof offered by the plaintiff.

There is another ground upon which we regard the evidence offered and excluded as having been quite immaterial. There is, as we believe, no authority in law for the distinction between granting a license to teach as a *quasi* judicial act and the ministerial act of issuing a certificate of the fact that such license has been granted, sought to be maintained by the allegations of the third and fourth paragraphs of the complaint respectively, and which was implied by the proffered evidence in question.

The granting of a license, and the issuing of a license, are clearly convertible terms within the meaning of section 4425 of the existing statutes of the State, herein above set out. Webster's dictionary states the secondary meaning of the word "license" to be "The written document by which a permission is conferred," and it is plainly in that sense that the word is used in the section of the statutes lastly above referred to. The licensing authorized by that section, therefore, implies the issuing to an applicant of a written permission to teach in the public schools.

The plaintiff called the defendant to the stand as a witness, and in connection with his testimony the defendant produced several sheets of paper which he said had been used in the examination of the plaintiff, and upon which certain questions and answers, as well as figures and marks, were written. He was examined at some length as to what certain things written or marked on the face of those papers indicated, and as to the relative ratio of the plaintiff's answers to some of the questions addressed to him, as well as to the manner in which the plaintiff sustained himself generally in his examination. In that connection, however, it was made to appear that the papers in question were only a part of the papers used in the examination of the plaintiff, the rest having been lost or destroyed in some way unknown to the defendant. The plaintiff thereupon offered the sheets of paper

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produced in court by the defendant as above, with the memorandums thereon in evidence, but the circuit court refused to admit these papers, as well as the memorandums upon them, in evidence, and that decision is claimed to have been palpably erroneous.

In the first place, the papers thus offered as evidence were, as has been seen, only fragmentary parts of a full set of papers pertaining to the occasion upon which they were used, and were hence of themselves, in that condition, of very little, if any, value as evidence for any purpose. In the next place, the accuracy of all the memorandums made or entered upon these papers was not sufficiently established by preliminary evidence to entitle them to be put in evidence in their entirety. In the third place, as these papers contained only fragmentary and unsigned memorandums, and as they were primarily produced and used in court to refresh the defendant's memory as a witness, and as it was not made known that the witness could not testify orally to all the matters embraced in the memorandums, after refreshing his memory by a reference to them, no emergency was shown for the introduction of the papers themselves in evidence. *Wharton Ev.*, sections 516, 517; *Kelsea v. Fletcher*, 48 N. H. 282; *Clark v. State*, 4 Ind. 156.

Under the circumstances in connection with which these papers were proposed as evidence, they might doubtless have been admitted as such without material injury to either party, but evidently no available error resulted from their exclusion. It may be remarked, however, that as applicable to memorandums used to refresh the memory of a witness, different rules sometimes prevail as to the use of such memorandums upon cross-examination.

The judgment is affirmed, with costs.

Filed Jan. 7, 1886.

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No. 12,462.

JOHNS v. THE STATE.

CRIMINAL LAW.—*Prosecutions Before Justices of the Peace.*—*Arraignment.*—In a prosecution before a justice of the peace, a mere failure to arraign the accused is not an available error.

SAME.—*Plea Necessary.*—A trial in a criminal case before a justice of the peace without a plea is erroneous.

SAME.—*Presumption that Plea was Entered.*—Where the record discloses nothing as to the plea, it will be presumed that one was required and interposed.

SAME.—*Appeal.*—*Practice.*—Where there has been a plea before the justice of the peace, no further plea is required in the circuit court on appeal.

SAME.—*Obstructing Public Highway.*—*Character of Way.*—*Evidence.*—*Statute Construed.*—Section 1811, R. S. 1881, which provides that in a prosecution for obstructing a public highway, "it shall be sufficient to prove that it is used and worked as such," does not make such proof conclusive as to the character of the way, but merely makes it sufficient, in the absence of countervailing evidence, to sustain the charge.

SAME.—*Instructions to Jury.*—*Supreme Court.*—*Practice.*—Where the evidence is not in the record, the Supreme Court will not deem an instruction erroneous if it would be correct in any supposable state of the evidence.

From the Clay Circuit Court.

J. A. McNutt, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ZOLLARS, J.—Appellant was convicted before a justice of the peace upon a charge of having obstructed a public highway. He appealed to the circuit court, where he was again convicted. From that judgment he has appealed to this court. It is recited in the transcript made by the justice of the peace that appellant was arrested and brought into court, and that the cause was tried. In the transcript of the proceedings in the circuit court, it is shown that he appeared in person and by counsel, and that the cause was tried by a jury. The record, however, does not show affirmatively that he was arraigned, nor that he pleaded to the affidavit in either court. For this reason he insists that the judgment should be reversed.

104	567
150	330
151	253
104	557
154	113
104	537
158	88

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Section 1762, R. S. 1881, provides that the defendant in a criminal case shall be arraigned by the reading of the indictment or information to him by the clerk, unless he waives the reading, and shall then be required to plead immediately thereto; but the court, for cause shown, may grant further time to answer.

Section 1763 provides, that in all criminal prosecutions, except in cases where the defence of insanity is relied upon, the defendant may plead the general issue orally, which shall be entered on the minutes of the court, etc.

Section 1766 provides, that if the defendant stands mute, or refuses to plead, etc., a plea of not guilty must be entered by the court, etc. These sections are the same in substance as sections 96, 97, and 98, 2 R. S. 1876, p. 398. The rulings under these sections have been that a trial without an arraignment, unless waived, and without a plea, is erroneous; and the record must show affirmatively that the defendant was arraigned, or waived it, and that he pleaded to the indictment or information, or, standing mute and refusing to answer, a plea was entered for him by the court. *McJunkins v. State*, 10 Ind. 140; *Graeter v. State*, 54 Ind. 159; *Fletcher v. State*, 54 Ind. 462; *Tindall v. State*, 71 Ind. 314; *Shoffner v. State*, 93 Ind. 519.

The above statutes and decisions have reference to the practice in the circuit and criminal courts, and have no reference to the practice before justices of the peace, unless there is some other statute under which the above are made applicable in such courts. We know of no such statute. We are referred to section 1456, R. S. 1881, but that section has reference to the practice in civil, and not in criminal, cases before justices of the peace. There is no statute which, in affirmative terms, requires either an arraignment or a plea in criminal cases in these courts.

Section 1628 is as follows: "When the officer holding the warrant arrests the accused, he shall take him before the justice of the peace; and it shall be the duty of such justice

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to docket the cause as in civil cases, and to hear the cause, and either acquit, convict and punish, or hold to bail, the offender, or if the offence be not bailable, commit him to jail, as the facts and the law may justify." There are other sections providing that if the offence charged is a misdemeanor, and one that the justice of the peace has jurisdiction to punish, a jury may be demanded, etc., but none of them provide in express terms for an arraignment, nor for a plea.

May such a case, then, be tried before a justice of the peace without an arraignment or plea? The pleading and practice in justices' courts are not very formal or exact. The failure to arraign an accused in one of these courts would not be such an omission as would justify this court in reversing a judgment of conviction, especially if he has had an opportunity to examine the charge against him, or has interposed a plea.

Aside from any express statutory provisions, a proper practice requires that before proceeding to trial in one of these courts upon a criminal charge, the accused should be given the opportunity and be required to enter a plea of guilty, or interpose a plea of not guilty, so as to form an issue for trial. Especially is this so in cases where the justice has jurisdiction to dispose of the case upon its merits, and is not sitting simply as an examining magistrate.

The above cases hold that a trial in a criminal case without a plea is erroneous, because it is a trial without an issue. There is no reason why the doctrine of these cases should not be applied in the trial of criminal charges before justices of the peace. The reason for the holdings obtains equally, whether the trial is before a justice of the peace or in one of the courts of superior jurisdiction.

It would also be a better and safer practice for the justice to enter the plea upon his docket as a part of the proceedings in the case, but there is no statute requiring such an entry, as there is where such cases are tried in courts of superior jurisdiction. If, in fact, the plea of not guilty is inter-

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posed by the accused, the failure of the justice to enter it upon his records would not be sufficient cause for a reversal of the judgment by this court.

It is the duty of the justice to require a plea before proceeding to the trial of a criminal charge. It must be presumed that in the trial of such causes the justice performs his duty, and when nothing to the contrary appears, it will be presumed that a plea was required and interposed. This court must presume in favor of the regularity and validity of the proceedings of the lower courts until the contrary is made to appear by the record. *Shoffner v. State*, *supra*; *Crowell v. City of Peru*, 41 Ind. 308; *Bowen v. Pollard*, 71 Ind. 177; *Puett v. Beard*, 86 Ind. 104; *Powers v. State*, 87 Ind. 144; *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *City of Indianapolis v. Murphy*, 91 Ind. 382; *Brown v. Anderson*, 90 Ind. 93; *Houk v. Barthold*, 73 Ind. 21.

When it appears that inferior courts have by law jurisdiction of the subject-matter, and have acquired jurisdiction of the persons of the parties litigant, the same presumptions are indulged in favor of the regularity and validity of their proceedings as are indulged in favor of the proceedings by courts of superior jurisdiction. *Argo v. Barthand*, 80 Ind. 63; *Heagy v. Black*, 90 Ind. 534; *Simonton v. Hays*, 88 Ind. 70; *Hopper v. Lucas*, 86 Ind. 43.

In the case before us, the record being silent, a presumption must be indulged in favor of the regularity of the proceedings before the justice of the peace, and hence that the accused was required to and did interpose a plea of not guilty before the trial was had. When this presumption is indulged, it disposes of the question in the circuit court, because where there has been a plea before the justice of the peace, no further plea is required in the circuit court upon appeal. *Eisenman v. State*, 49 Ind. 520.

Section 1964, R. S. 1881, upon which this prosecution is based, provides that whoever in any manner obstructs any public highway shall be fined, etc.

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The second instruction given by the court is as follows: "In prosecutions for obstructing a public highway, upon the question of the existence of such highway, it is sufficient to prove that the same was at the time of the alleged obstruction used and worked as such. The work here referred to is such as is done by authority of the proper supervisor."

This instruction was based upon section 1811, R. S. 1881, which is as follows: "In any prosecution for obstructing a highway, * * * * it shall be sufficient to prove that it is used and worked as such."

This section should not be construed as undertaking to make such proof conclusive of the fact that the way alleged to have been obstructed is a public highway. The Legislature can not thus make any item of evidence conclusive. *Wantlan v. White*, 19 Ind. 470.

The reasonable interpretation of the section is, that such proof, in the absence of countervailing proof, is sufficient to sustain the charge that the way is a public highway. The case thus made may be overthrown by proof of such facts as will show that the way is not a public highway, or by proof of such facts as will raise a reasonable doubt as to whether or not it is such public highway.

The purpose of the statute is to dispense with the tedious and sometimes difficult proof that the way is a public highway, where in fact there is or ought to be no real controversy about that fact.

In this case, the evidence is not in the record, and hence we can not know that there was any evidence at all, as to the highway, except evidence of the use and work which the charge implies. That evidence the statute makes sufficient in such a case. Whether or not such an instruction as the above would be a proper one, in a case of conflict in the evidence as to the existence of the way as a public highway, is a question we need not now decide.

Other instructions are objected to by appellant, but as the

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evidence is not in the record, we can not say that they were erroneous or worked injury to him. The rule is, that where the evidence is not in the record, this court will not deem instructions erroneous if they would have been correct in any supposable state of the evidence. *Hunt v. Elliott*, 80 Ind. 245 (41 Am. R. 794); *Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24; *Elkhart Mut. Aid, etc., Ass'n v. Houghton*, 103 Ind. 286.

Having found no error in the record for which the judgment should be reversed, it is affirmed, with costs.

Filed Jan. 5, 1886; petition for a rehearing overruled March 25, 1886.

No. 11,698.

ROCHESTER v. LEVERING.

104	562
166	71
104	562
167	448
167	451
167	452

PRINCIPAL AND AGENT.—*Purchase by Confidential Agent of Principal's Property.*—Where one, while occupying the relation of general confidential business agent of another, is requested by the latter to find a purchaser at a fixed price for certain land, but being unable to do so proposes to buy the property himself at that price, at the same time communicating to his principal all the facts within his knowledge about the land and its value, misrepresenting or concealing nothing, and a sale is accordingly made to him, the price paid being at the time a fair one, such sale is valid.

SAME.—*Burden on Agent to Show that Sale was Fair.*—When the sale is seasonably attacked, the burden is on the agent to show that the bargain was fair and equitable, that he gave all the advice in his knowledge pertaining to the matter, and that there was no suppression or concealment which might have influenced the conduct of the principal.

SAME.—*Agreement to Lay Out into Lots.*—*Payment from Proceeds.*—A writing, executed by the agent as evidence of his obligation for the purchase-price, stipulating that he is to lay the land out into town lots, but specifying no time, and to pay the agreed price, with a certain rate of interest, out of the proceeds of the sales of said lots, in money or promissory notes taken, is not so contingent or unfair as to invalidate the sale.

SAME.—*Subsequent Transactions.*—The sale of the land can not be affected by independent dealings which were had afterwards, and which had no relation to the principal transaction.

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SAME.—*Insurance of Principal's Property in Company Represented by Agent.*—

Where the general business agent of another is also the agent of an insurance company, and in the latter capacity writes insurance upon the property of his principal, but with such knowledge on the part of the company as would make the policies valid, or at most merely voidable, he is entitled to be reimbursed for the premiums paid by him.

SAME.—*Forfeiture of Compensation for Services.*—Mere errors of judgment on the part of an agent while managing his principal's business, or omissions which do not amount to misconduct or culpable negligence, do not work a forfeiture of the agent's right to compensation for services.

SAME.—*Interest.*—Where, in order to meet the calls, in uncertain amounts, of his principal upon him, it is necessary that an agent—who, as it is received, mixes his principal's money with his own and uses it in his business—shall keep money available, he is not chargeable with the highest obtainable rate of interest on the sums remaining in his hands, but legal interest only.

SAME.—*Agent's Liability for Loss.*—An agent who, by neglect and want of diligence, fails to collect money of his principal loaned by him, is liable for the loss.

SAME.—*Judgment Without Relief.—Trust Funds.*—Under section 577, R. S. 1881, a judgment without relief against an agent, in favor of his principal, for money for which he is liable as a trust fund, is proper.

From the Tippecanoe Circuit Court.

S. P. Baird, J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

J. R. Coffroth, T. A. Stuart, F. H. Levering and F. B. Everett, for appellee.

MITCHELL, J.—A complaint filed by John Levering against Madeline Rochester, and a cross complaint filed by the latter against Levering, constitute the basis of the controversy exhibited in the record in this case.

The complaint seeks a recovery upon an account exhibited with it, for services rendered, money loaned, paid out and expended by the plaintiff at the defendant's instance and request. The cross complaint charges that from the year 1862, down to and including the year 1878, the plaintiff, Levering, was in the relation of agent and attorney to the defendant, Mrs. Rochester, having in charge the control and management of all her property and business, and that while in such

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relation he so managed her affairs and business and dealt with her as that upon an accounting and proper adjustment of their business a large sum of money, amounting to over \$20,000, would be due her.

Upon issues made the case was heard and a special finding of facts, with conclusions of law stated thereon, filed by the court. With the facts as found, both parties are content, while each excepted to and are yet, by assignment of errors and cross errors, respectively, contending against some of the conclusions of law.

The controversy involves a great variety of transactions, covers a period of more than eighteen years of business, and required the adjustment of an account aggregating but little short of \$80,000. That it was reduced to the order and symmetry in which the special findings present it, is abundant evidence that the case was tried with extraordinary care and ability.

The facts upon which the first conclusion of law is based are, in substance, as follows: Mrs. Rochester, in addition to a large amount of other property, was the owner of thirty acres of land in the extreme south part of the city of Lafayette. Through her agents, Mr. Levering and his brother, she sold fifteen acres off the south side of this tract to Owen Ball for \$4,000, in August, 1865. About the same time Ball offered to purchase the remaining fifteen acres for \$3,500. This was refused. The appellant and Mr. Levering about that time went to Ball and solicited him to purchase the remaining fifteen acres for \$4,000. Ball again offered \$3,500, and would give no more. Mrs. Rochester then requested the appellee to find a purchaser for this tract and other unimproved lands owned by her, which she was anxious to sell. This the appellee tried to do, but the highest offer made for the tract in question was \$3,500 by Ball. The tract was unfenced, unimproved and unproductive, and its main value was probable and prospective for platting into town lots with a view to selling it in lots. The court finds

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it difficult to state the real value of the tract at the time of the sale to Levering, hereinafter mentioned, (but its approximate value at that time was found to be \$4,500.)

It is found that on the 19th day of February, 1869, while Mr. Levering was acting as the confidential agent of Mrs. Rochester, and while acting as her agent to sell the tract of land mentioned, he proposed to buy the land from her himself, at the price of four thousand dollars, agreeing that he would lay it out into lots, as an addition to the city of Lafayette, and that he would pay the price mentioned, with six per cent. interest, in money or notes, out of the proceeds of sales of the lots.

(He represented to her that, in his opinion, it would be better for her to sell it to him than to hold it.) It is found by the court that he fully and correctly communicated to her all the facts of which he had knowledge about the tract of land and its value, and that he made no misrepresentation, nor did he conceal from her any fact concerning the land or its value, and that (the price offered, so far as could then be known, was not manifestly inadequate.) Mrs. Rochester had full confidence in the judgment of her agent, and relied upon his advice as to the propriety of making the sale, and concerning the value of the land.

Under these circumstances, and without consulting any person other than Mr. Levering, the appellant sold the tract to him on the terms proposed, and executed to him a warranty deed therefor. As evidence of his obligation to her for the purchase-price, he executed an instrument of writing signed by him, in which the purchase of the land is recited, and in which his agreement to pay is stated as follows: "I am to lay out said land into town lots, as an addition to the city of Lafayette, and will pay to said Madeline Rochester, out of the proceeds of the sales of said lots, in money or promissory notes taken, the sum of four thousand dollars, with interest at the rate of six per cent."

It is found that the tract was laid out into sixty-nine town

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lots, in the month of April, 1869; that a plat was filed, calling it "John Levering's addition to Lafayette," and (that from May 28th, 1869, to August 9th, 1874, Levering sold thirty-nine lots, receiving for principal and interest from such sales, in the aggregate, \$9,010.85, leaving thirty lots still unsold.)

The purchase-money was never actually paid by Levering, but in a settlement had on the 15th day of June, 1874, which was afterwards found to be erroneous, Levering credited Mrs. Rochester's account with the \$4,000 and the accrued interest thereon, according to the contract as modified. The appellant paid out about \$600 for the improvement of Fourth street, which ran along or through the tract; but this sum was paid by using a judgment, which belonged to Mrs. Rochester, against one Austin. This judgment was used by Mr. Levering, upon an agreement with Mrs. Rochester that he would change his obligation to her so as to allow ten per cent. interest on the \$4,000 purchase-money for the land, instead of six. This was accordingly done.

The court also found that Levering had a well appointed and centrally located office in the city of Lafayette, with two or three clerks constantly in attendance; that by reason of these facilities, and his extensive business connections and his energy and industry, he had great advantages in effecting sales of real estate; that soon after the purchase from Mrs. Rochester, Fourth street, lying along the east line of the addition, laid out of the land purchased, was improved, and on that account lots in that locality became more desirable; that many of them were sold at prices largely in excess of the price paid for the land in bulk. The court finds it impossible to state how much of the advanced price obtained was due to the superior facilities and the individual energy, industry and efforts of Levering.

Among other facts found, in addition to those above recited, which cast some light on the transaction, it may be stated that it was found that Mrs. Rochester was a lady of

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superior intelligence, but inexperienced in business matters, or in relation to the value of real estate; that she had entire confidence in the judgment and honesty of Mr. Levering; that he generally explained all business transactions to her, and that he had the entire management and control of her property and business; that he kept her accounts, which were always open to her inspection, and that she frequently examined them.

The first conclusion of law stated by the court was, that the sale of the land was valid and binding and free from actual or legal fraud, and that the plaintiff Levering's account should be charged with the sum of four thousand dollars, the purchase-price of the land, as so much money received by him at the date of the sale.

The conclusion of law which affirms the validity of this sale is the chief subject to which the appellant's argument is directed. It may be remarked, that so far as the contention relates to sales by a trustee or other person having a power or agency to sell property, which, in the execution of such agency, the agent or trustee either directly or indirectly sells to himself, the argument is not deemed to be relevant to the case under consideration. That an agent to sell property can not, either directly or indirectly, become the purchaser from himself, and that such sale is voidable absolutely at the election of the principal or beneficiary, without regard to its fairness, are propositions inflexibly established.

The facts found do not make this a case of that description. While they disclose a relation of the closest and most confidential character between principal and agent, so far as the general management of the financial and business affairs of the principal were concerned, they also show that the agent had no power to sell, and that he did not, in fact, make the sale. The agency with respect to the particular tract of land is stated in the following language: "That said Madeline was desirous of selling this tract, as well as her other unimproved land, and requested said plaintiff to find a pur-

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chaser therefor, which he tried to do; * * * that while acting as the confidential agent of said Madeline, and her agent to sell said fifteen acre tract, plaintiff proposed to buy it himself." Fairly interpreted, this means that while in the relation of general confidential business agent to the appellant, Mr. Levering was requested to find a purchaser for the land who would pay a fixed price, and while so acting as agent to sell he proposed to purchase the land from his principal and negotiated with her the purchase which is now the subject of controversy.

The case is one arising out of a transaction between a confidential agent and his principal, who purposely and intentionally dealt with each other concerning a subject-matter involved in the agency. The result of the negotiation between the two was, that the principal consciously and knowingly transferred to her confidential agent the land in controversy at a stipulated price.

While a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will, nevertheless, subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the richest of faith imparted to his principal all the information concerning the property, possessed by him.

The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable, that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property, and that there was no suppression or concealment which might have influenced the conduct of the principal. *McCormick v. Malin*, 5 Blackf. 509, 522; *Cook v.*

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Berlin, etc., Co., 43 Wis. 433; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Young v. Hughes*, 32 N. J. Eq. 372; *Farnam v. Brooks*, 9 Pick. 212; *Moore v. Mandlebaum*, 8 Mich. 433.

As applicable to cases of the character under consideration, the rule is succinctly stated by a learned author in the following language:

“Passing to dealings connected with the principal’s intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome; although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction, and of the person with whom he was dealing, and gave full and free consent—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid.” 2 Pom. Eq. Jur., section 959.

Subject to the burdens thus imposed, as was stated in *Fisher’s Appeal*, 34 Pa. St. 29, “it never has been supposed that a principal might not sell to his agent, or the client to his attorney; and that their titles, thus acquired, would not be good in the absence of fraud on their part.”

In the light of the foregoing principles we may now briefly recur to the facts.

Mrs. Rochester and her agent called on Mr. Ball, who had bought half the thirty acre tract, and solicited him to pur-

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•chase the remaining fifteen acres at the price of four thousand dollars. He refused to pay more than thirty-five hundred. The agent, then being solicited to find a purchaser, was unable to secure an offer in excess of that made by Ball. The property being unproductive, its value purely prospective and largely contingent on events that might or might not happen, such as the growth and improvement of the city to which it lay contiguous, and the demand which might arise for lots in that direction, can it now be said, after this lapse of time, that the price paid was not fair?

That it was difficult to ascertain the real value of the land with much certainty at the time of the sale, is disclosed in the special finding of facts, and that it was necessarily so is inherent in the very nature of the case. Considering the length of time which intervened from the sale until the investigation was set on foot, the condition of affairs at the time the sale was made, the inflation in values, and the speculation in real estate which ensued, and continued until the latter part of 1873, covering the period during which substantially all the lots disposed of were sold by Levering, and the obstacles which lay in the path of the investigation are apparent. That the approximate value, as arrived at under these circumstances, is stated to have been forty-five hundred dollars fully justifies the further statement that the price paid was not manifestly inadequate, in effect that the price was fair. As was said by Mr. Justice Story, in *Prevost v. Gratz*, 6 Wheat. 481, "length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be encumbered."

When it is remembered that the transaction was had in

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February, 1869, and that it was permitted to stand unchallenged through all the changes in the situation and fluctuation of prices until January, 1883, we think all that can be required of the defendant is to make it certain to a common intent that the price paid was fair and equitable. This has been done. That the purchaser, by the succession of events, the rise in value of the property on his hands, coupled with his energy, ability and industry, and his facilities for selling the lots, sold the property for more than he paid for it, can not now be taken as the measure of its value at the time of the purchase, nor can it be assumed on that account that the plaintiff was overreached in the purchase. *Fisher's Appeal, supra*. Having paid a fair price for the property, and fully communicated to his principal all the facts within his knowledge about the land and its value, misrepresenting nothing, concealing nothing, the appellee has brought the transaction within the rule which authorizes it to stand.

As related to the subject we are considering, it was urged on the argument that the obligation given for the purchase-price was such that the purchaser came under no absolute contract to pay for the land, that his liability to pay was contingent upon his realizing the amount stipulated to be paid from sales of lots, and that this was so unfair that the sale should have been set aside.

We do not think the contract admits of the construction contended for. The contract recited that the land was conveyed at the price of \$4,000. The import of this was a debt for a specified amount then presently due. The unilateral stipulation contained in the writing, to the effect that the purchaser would lay the land out into lots, specifying no time, and pay the amount with interest out of the proceeds of sales in money or promissory notes, was, if of any force whatever, at most an agreement on his part that he would do so within a reasonable time.

It is insisted that because the Austin judgment which belonged to Mrs. Rochester was used by her agent to pay for the

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street improvements, and because the amount of the purchase-price of the land and the accrued interest thereon were liquidated by being included in a partial settlement made in 1874, which was afterwards found to be erroneous, an imputation of bad faith in making the purchase of the land arises. These were all matters occurring long after the transaction which is assailed was completed, and can not be supposed to have been contemplated. They did not exist at the time the land sale was made, and could, consequently, have exerted no influence upon it, one way or the other. They were matters only relevant to be considered in the adjustment of the accounts between the parties, and in that connection they were considered by the learned court and properly adjusted. The sale of the land can not be affected by independent dealings or transactions which were had afterwards, and which had no relation to the principal transaction here involved. *Sherman v. Hogland*, 54 Ind. 578.

Having thus arrived at the conclusion that upon the facts found the purchase of the land was not in itself impeachable, we need not consider the proposition, advanced and much debated in the briefs, that the plaintiff's proceeding to set it aside has been so long deferred as to bring it within the rule applicable to stale claims.

It was found by the court that during the continuance of Mr. Levering's agency and management of Mrs. Rochester's affairs, he attended to procuring insurance against loss by fire upon her property. He was at the same time the agent of the *Ætna Fire Insurance Company*, and from year to year, or as insurance was deemed necessary, policies of insurance were written by him upon her property, and the amount of premiums thus accruing was charged against her in his account. Several hundred dollars was in this manner charged against her, and in taking the account the learned judge at *nisi prius* allowed for the items thus charged.

It is now insisted that because the agent of the insurance company was also the agent of Mrs. Rochester, the policies

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issued by him as agent to cover her property against loss were void, that they afforded no protection, and that the account for premiums paid should have been disallowed. *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

It is found by the court that while it was not known to the insurance company that Mr. Levering was the agent of Mrs. Rochester in effecting the insurance, it was stated in his reports made to the company that the property insured was controlled in his office. Insurance so effected would at the most be only voidable, depending upon the relation of the agent of the company to the property, the interest and authority which he had in respect of its management, and the knowledge possessed by the company of such relation and authority. That the insurance company was informed that the property insured was controlled by its agent, or in his office, was presumptively sufficient to indicate to it that the matter of securing indemnity by way of insurance was also under his control.

The policies having been permitted to stand with this information, we have no doubt they would have been enforceable against the company. At all events, as the policies were at the utmost only voidable, upon the return of the premiums paid, we can not presume that they would have been avoided in case of loss, and by indulging such presumption deny the appellee's right to be reimbursed for the premiums paid.

The next question presented for consideration relates to the right of the appellee to receive compensation for services while conducting the business of Mrs. Rochester.

It is found by the court that during the continuance of the agency various items, amounting in the aggregate to about three thousand dollars, were charged in the account against Mrs. Rochester for services in attending to her business.

Concerning these charges the court made the following specific finding:

"That all of said charges for services are reasonable, and

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that it was fully worth, substantially, more than the amounts so charged by said agents, and by said plaintiff as such agent, to do the work done by them as such agents, or by said plaintiff, as such sole agent."

The account for services was allowed by the court below. Fully recognizing the rule that where an agent has violated his trust, or has been guilty of fraud or gross neglect of duty, thereby imposing upon his principal the necessity of expensive litigation in order to secure his rights, the penalty for such fraudulent conduct or wilful violation of duty is the forfeiture of all compensation, yet this rule should never be applied to mere mistakes in the keeping of an account, or errors of judgment, or other omissions which do not amount to misconduct or gross and culpable neglect or disregard of duty. We are unable to discover anything in the facts of this case which demands the application of the rigorous rule contended for.

The only other objection made to the conclusions reached by the *nisi prius* court is in respect of the rate of interest allowed. It is contended that, in stating the account, interest at the rate of ten per cent. instead of six should have been charged against the agent for all sums found to have remained in his hands.

The findings state that appellee had possession of all appellant's moneys, securities and books of account, with authority to invest, reinvest and collect her moneys, and that she relied upon him to loan and collect the same; that during the agency of appellee, appellant's moneys, as received by him, were mixed with his own moneys and used in his business; that from the 1st of July, 1868, to the 1st of July, 1878, the current rate at which money was loaned, secured by first mortgage on real estate in Tippecanoe county, was ten per cent. per annum, interest payable yearly, the borrower to pay all expenses of making the loan, so as to net the owner of the money ten per cent. per annum.

While the manner of mixing and using the moneys be-

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longing to his principal is not to be commended, it is nevertheless inferable from the accounts exhibited in the record and the general character of the dealings between the parties, as shown by the special findings, that for all the current expenses of herself and family and for all expenses incurred in maintaining her property, Mrs. Rochester relied upon her agent to respond with money as the occasion might require. This necessarily involved the keeping of money either of his own or of his principal always available. It may be inferred that the character of the business relation between Mrs. Rochester and her agent was such that it imposed upon the agent the entire responsibility of looking after her business, to such an extent that her entire time and thought could be and were devoted to rearing and educating her children, without further concern than to call or make drafts upon her agent as money was needed. Considering that her fortune was such as to involve the handling of the amount exhibited in the account stated, it may well be that the necessity for considerable sums was frequent. The amount on hand uninvested at any one time does not seem to have been large compared with the affairs under control. That investments were not more closely made, can not, under the circumstances, be imputed to such neglect as should charge the agent with the highest attainable rate of interest. Indeed, if any error at all was committed by the court below, it was in applying too rigorous a rule against the agent, by charging him with compound interest on all sums found to be in his hands as hereinafter stated.

We have thus disposed of all the errors assigned by the appellant. As there was a judgment against the appellee below, and inasmuch as he excepted to some of the conclusions of law stated, it is proper we should consider the cross errors assigned by him in this court, notwithstanding the conclusion so far reached on the errors assigned by the appellant. *Kammerling v. Armington*, 58 Ind. 384. The case is not

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analogous to nor controlled by *Thomas v. Simmons*, 103 Ind. 538.

It was found that in the course of his agency the appellee had loaned four hundred and eighty-two dollars and eighty cents of the funds of his principal to one McBride, who was at the time in debt, but able to pay; that the money so loaned might have been collected if proper steps had been taken to that end, but that the appellee took no steps to collect it, and the amount was lost. This sum was charged against the appellee by the court below, and this is one of the grounds of complaint made by a cross error assigned.

The facts found justify the conclusion reached in that regard. It is apparent that the appellee had permitted himself to become so far involved in the affairs of McBride, who was known by him to have come into such financial stress that he could not with propriety neglect the debt due from him to his principal. We think, while he was not guilty of wilful default, he was chargeable with such supine negligence as made him properly liable. He was under an obligation, at least, to use the same diligence in behalf of his principal that he used in respect to his own affairs. This it is shown he did not do.

The next cross error assigned relates to the action of the court in charging the appellee with the amount of the Austin judgment, which was used by the appellee in paying for street improvements. Without rehearsing the facts, we think he has no just ground of complaint in that regard.

It is next complained, that the court erred in its sixth conclusion of law, the force of which set aside the transfer of certain lots conveyed by McBride to the appellee, and subsequently conveyed by him to Mrs. Rochester in liquidation of a debt due from McBride to her, the payment of which the appellee had assumed. The appellee had become so complicated with the affairs of McBride that he found it expedient to accept the conveyance of a number of lots, and to assume the payment of a loan of money belonging to Mrs.

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Rochester which he as agent had made to McBride, and which was secured by mortgage on the lots transferred by McBride to the appellee. This debt, so assumed and secured, the agent subsequently discharged by transferring some of the lots conveyed by McBride to him to Mrs. Rochester, the transfer of which was accepted in payment of the debt assumed under his advice. They were found to be of much less value than the amount of the debt. Without further rehearsing the facts, it is sufficient to state that within the rules already referred to, governing dealings between principal and agent, we think the conclusion reached by the court was right.

The fourth cross error assigned, which relates to the seventh conclusion of law, is not insisted upon in the argument, and is therefore waived.

The next cross error assigned relates to the method adopted by the court in stating the account and charging interest on balances found to be in the appellee's hands.

The method adopted was to consolidate all the accounts, take the difference between the receipts and disbursements for the first current year as the first principal, upon which interest was computed for one year at six per cent., and this interest was carried into the account for the second year. At the end of the second year the account was to be balanced, and interest computed on the balance and carried into the account for the third year, and so on down through each year to the end of the current year, in which the plaintiff ceased to be agent. From thence down to the date of the taking of the final account, interest was computed with annual rests at six per cent. Upon the facts as they appear, and in the absence of the evidence, there is nothing before us which authorizes us to say this was wrong.

Without a further rehearsal of the facts, this much may be said, while the method adopted by the court in stating the account may have resulted in some apparent hardship to the appellee, the impression comes irresistibly from the whole

record that he allowed his accounts to come into such a state of confusion and irregularity as must preclude any ground of complaint on his part, even though the court, in unraveling the tangled skein, felt obliged to cast some doubts in respect of interest in favor of his adversary.

Under section 577, R. S. 1881, it was right that the judgment should have been rendered without relief from valuation or appraisement laws. We do not forget that some of the items which went into the account were for property purchased, but the whole was properly treated as money paid into the agent's hands for the property as it should have been paid for at the time the property was purchased, and as it should have gone into the account if the account had been properly kept. It was, in the consideration of the court, a trust fund, treated as though it was actually received at the time and in the manner it should have been received.

There was no such ambiguity or inconsistency in the special finding of facts as made the granting of a *venire de novo* proper, nor can we say, in the absence of the evidence, that the motion for a new trial was not properly overruled.

Upon the fullest examination of the whole record, and a careful consideration of all the points made on both sides, we are persuaded that justice was substantially accomplished, and that it would be impossible to arrive at a better result than that already reached. As we find no error, the judgment is affirmed, at the appellant's costs.

Filed Jan. 9, 1886.

No. 10,936.

BARTON v. ANDERSON ET AL.

JUDGMENT.—*Default.—Conclusiveness.—Foreclosure of Mortgage.*—In a suit to foreclose a mortgage, a judgment by default against one who is made a party to answer as to any interest he may have in the mortgaged prop-

104 578

130 309

104 578

181 18

133 666

104 578

146 48

104 578

155 681

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erty, is conclusive as to any prior claim of interest or title adverse to the plaintiff.

EVIDENCE.—*Parol Evidence to Explain Abbreviations.*—Where land is described on a tax duplicate and in a tax deed in abbreviated terms, parol evidence is admissible to explain, consistently with such terms, as to what land they refer.

From the Marion Superior Court.

J. Buchanan and G. B. Manlove, for appellant.

S. Claypool, W. A. Ketcham and J. T. Lecklider, for appellees.

NIBLACK, C. J.—Complaint by Henry P. Barton against William C. Anderson, Daniel W. Grubbs, William Rowe, Henry G. Hannaman, Frederick A. W. Davis and others, constituting the Indiana Banking Company, and several other persons, to have his title quieted to a particularly described lot or piece of ground known in general terms as the southwest part of out-lot sixty-six (66), in the city of Indianapolis, fronting on the north side of Washington street one hundred and twenty (120) feet, and running north to Pogue's Run.

Grubbs answered, disclaiming any interest in the land described in the complaint, and averring that, before the commencement of the action, he had conveyed and transferred to the Indiana Banking Company all his interest in and claim to such land.

Anderson, Rowe, Hannaman and the Indiana Banking Company answered separately in denial. Each, also, filed a cross complaint asserting a lien upon the land under a tax deed executed upon and in pursuance of a sale for delinquent taxes charged against it, the deed in each case being based upon a sale different from those described in the other cross complaints respectively.

Issues being also formed upon the cross complaints, the court, trying the cause at special term, found that the plaintiff was the owner in fee simple of the land in controversy, but that he held the same subject to the liens respectively

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asserted and set up by the cross complainants, finding, also, the amount due to each cross complainant. A motion for a new trial being first thereafter denied, judgment was entered in accordance with the findings of the court, to which was added an order that unless the plaintiff should, within sixty days therefrom, pay the several sums respectively adjudged to be due to the cross complainants, and to be liens upon the land, such land should be sold to pay and discharge such liens; and this judgment was affirmed at general term.

It was made to appear by the evidence that, on the 27th day of September, 1873, Nicholas R. Ruckle and Frederick Knefler mortgaged the land in judgment in this case to John C. Tracy and Samuel Bingham in trust, for the purpose of securing a loan to them of money; that, on the 5th day of August, 1876, Tracy and Bingham commenced a suit in chancery, in the circuit court of the United States for the District of Indiana, against Ruckle and Knefler to foreclose this mortgage; that Grubbs, herein above named, and many other persons, were made defendants to that proceeding, and required to answer the bill therein filed, upon the alleged ground that they either had or claimed to have some lien upon or interest in the mortgaged premises junior and subordinate to the mortgage then sought to be foreclosed; that said suit was continued until the 28th day of March, 1877, when Grubbs, upon whom process had been served, on the 11th day of August, 1876, and most of the other defendants, on being called, made default, and a decree of foreclosure was entered, including the usual order barring and foreclosing the equity of redemption of all the defendants; that Barton, the plaintiff herein, became the purchaser under that decree of foreclosure and was in possession under his purchase when he commenced this action.

It was further made to appear by the evidence that, at a sale of lands for delinquent taxes due the city of Indianapolis, held on the 14th day of February, 1877, Grubbs became the purchaser of the land embraced in the then pending fore-

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closure proceedings in the circuit court of the United States, as well as the complaint in this case, and that he, on the 17th day of February, 1879, received a tax deed for the land in question from the mayor and treasurer of said city of Indianapolis; that, on the 10th day of April, 1879, the said Grubbs transferred and conveyed to the Indiana Banking Company all his estate and interest in the land, and that the estate and interest thus transferred and conveyed by Grubbs constituted the basis of the lien asserted and set up by the Banking Company against the land under its cross complaint. The point was made at the trial, and is still insisted upon here, that by his default in the circuit court of the United States, and his failure to set up his tax claim when the decree of foreclosure was taken in that court, Grubbs became estopped from thereafter asserting any title to or interest in the land under his purchase at the tax sale, and that consequently the Banking Company acquired no estate or interest in the land by the transfer and conveyance which he assumed to make to it.

A judgment by default is as conclusive upon the judgment defendant as to any matter admitted by the default and adjudicated by the judgment which ensued, as any other form of judgment. Freeman Judg., sections 248, 330. But just what or how much is admitted by a default often becomes a difficult question in particular cases. The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint. *Unfried v. Heberer*, 63 Ind. 67; *Harrison v. Phoenix Mut. Life Ins. Co.*, 83 Ind. 575; *Compton v. Pruitt*, 88 Ind. 171.

As applicable, however, to a suit to foreclose a mortgage, and other kindred suits, in the nature of a proceeding *in rem*, where a party is made a defendant to answer as to his supposed or possible, but unknown or undefined, interest in the property, we think that, as against him, a default ought to be construed as an admission that at the time he failed to appear as required he had no interest in the property in question, and hence as conclusive of any prior claim of interest or

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title adverse to the plaintiff. Any less rigid rule of construction might, and in many cases doubtless would, defeat the very object properly had in view in making the party a defendant to answer as to his supposed or possible interest in the property involved, to the end that all claims to, or against, such property might be adjusted by the final judgment or decree, and further litigation thereby avoided. On this general subject see the cases of *Griffin v. Wallace*, 66 Ind. 410, *Ulrich v. Drischell*, 88 Ind. 354, *Hose v. Allwein*, 91 Ind. 497, *Edwards v. Dykeman*, 95 Ind. 509, *Gordon v. Lee*, 102 Ind. 125, 6 Wait Actions and Def. 810.

We are, consequently, led to the conclusion that the court below, at special term, erred in finding and in adjudging in favor of the claim set up by the Indiana Banking Company in its cross complaint. That cross complaint charged that Grubbs purchased the land in litigation at the tax sale for the use and benefit of the Banking Company, but there was no evidence in support of that allegation. Whether, conceding the fact that Grubbs did so purchase the land for the Banking Company, the latter is nevertheless bound by the default of the former in the foreclosure suit, is a question we have not considered, but as having some possible bearing on that question reference is made to section 252, R. S. 1881.

It was also shown at the trial that the land sold at the tax sale under which Anderson claimed, was described on the tax duplicate as "120 ft. Washt. St. S. W. cor. out. 66," and in tax deed to him as "one hundred and twenty (120) feet on Washington street, in the southwest corner, out-lot sixty-six (66), in Indianapolis, Marion county, Indiana."

In relation to the abbreviations on the tax duplicate, the treasurer and a deputy auditor of Marion county were both permitted to testify that "ft." meant "feet," that "Washt. St." meant "Washington street," that "S. W. cor." meant "southwest corner," and that "out. 66" stood for "out-lot 66;" also, that the description on the tax duplicate, as well as that contained in the tax deed to Anderson, referred to and

Crume v. Wilson *et al.*

was intended to be as it was, in fact, an abbreviated description of the land more specifically designated in the complaint in this cause.

There was no error in the admission of this evidence. Where a writing is in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms. 1 Greenl. Ev., section 282; Whart. Ev., section 1003.

The proceedings upon the cross complaints of Anderson, Rowe and Hannaman in this case are, to a greater or less extent, supported by the cases of *Ward v. Montgomery*, 57 Ind. 276, *Flinn v. Parsons*, 60 Ind. 573, *Cooper v. Jackson*, 71 Ind. 244, *Sloan v. Sewell*, 81 Ind. 180, *Parker v. Goddard*, 81 Ind. 294, *Brown v. Fodder*, 81 Ind. 491, *Reed v. Earhart*, 88 Ind. 159, *Peckham v. Millikan*, 99 Ind. 352, and no error has been shown upon those proceedings. As connected with the same subject, see, also, *McWhinney v. Brinker*, 64 Ind. 360, and *Barton v. McWhinney*, 85 Ind. 481.

So much of the judgment at general term as affirmed the judgment at special term in favor of the Indiana Banking Company upon its cross complaint is reversed. In all other respects the judgment at general term is affirmed. One-fourth of the costs of this appeal to be taxed against the Indiana Banking Company, and the remaining three-fourths against the appellant.

Filed Jan. 22. 1886; petition for a rehearing overruled April 1, 1886.

No. 12,280.

CRUME v. WILSON ET AL.

DRAINAGE.—*When Civil Procedure and Practice Applicable.*—The modes of procedure and the rules of practice prescribed by the civil code may be used to supply omissions in the drainage statutes.

104	583
141	432
143	246
104	583
147	170
104	583
155	284
104	583
162	683
104	583
164	664
104	583
168	532
168	586
104	583
171	443

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SAME.—Dismissal by Petitioner.—Under section 333, R. S. 1881, the petitioner for a drain may dismiss his case and withdraw his petition if his motion be made at the proper time.

SAME.—When Petitioner can not Dismiss.—It is too late for the petitioner to obtain leave to dismiss, after the filing of the commissioners' report and the lapse of the statutory period for remonstrating, the cause being then ready for final judgment. Section 3, act of March 8th, 1883 (Acts 1883, p. 173).

From the Howard Circuit Court.

M. Bell, W. C. Purdum, J. C. Blacklidge, W. E. Blacklidge
and *B. C. H. Moon*, for appellant.

J. F. Elliott and *L. J. Kirkpatrick*, for appellees.

Howk, J.—In this case the appellant Crume presented to the court below his verified petition praying for the location and construction of a certain ditch or drain. Proof having been made to the satisfaction of the court, that notice of the intention to present such petition had been given in the manner and for the time required by the statute, the court assumed jurisdiction of the case and ordered the same to be docketed as an action pending therein. Three days afterwards, no demurrer or objection to nor remonstrance against such petition having been filed, the court made an order referring the same to the commissioners of drainage. On the 15th day of December, 1884, the commissioners of drainage filed, in open court, their report of assessments of benefits and damages to the lands affected by the construction of such drain; and ten days were then given any owner of lands, affected by such work to remonstrate against the report of such commissioners. No further step was taken in the cause, so far as the record shows, until the 17th day of January, 1885, or thirty-three days after the filing of the report of the commissioners of drainage. On the day last named, the appellant moved the court in writing "for leave to withdraw his petition in the above cause, and to dismiss the same at his costs."

On the same day, the appellee Wilson, whose lands were

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assessed for benefits in the construction of such drain, appeared and objected in writing to the dismissal of appellant's petition. The court sustained appellee's objection and overruled appellant's motion, and approved and confirmed the report of the commissioners of drainage, and the assessments of benefits and damages mentioned therein. Finally, the court ordered that the construction of such drain be referred to Tence Lindley, one of the commissioners of drainage.

Errors are assigned here which call in question the rulings of the circuit court, (1) in sustaining the objections of appellee Wilson to appellant's dismissal of the cause, (2) in overruling appellant's motion for leave to dismiss the case, and (3) in approving and confirming the report of the drainage commissioners and ordering the construction of the drain.

Under these alleged errors, the question for our decision, and the only one discussed by counsel on either side, may be thus stated: At the time the appellant moved the court for leave to dismiss this cause, was he entitled to such dismissal as a matter of legal right?

When this suit was instituted, and during its pendency in the circuit court, the amended drainage law of March 8th, 1883 (Acts 1883, p. 173, *et seq.*), and sections 4273, 4279, 4281 and 4283, R. S. 1881, were in force and governed the case. Some of the provisions of section 3 of the amended act of March 8th, 1883, we think, are applicable to the question we are considering, and these we quote as follows: "Upon the making of such report to the court, ten days shall be allowed to any owner of lands affected by the work proposed to remonstrate against the report, and any such remonstrance shall be verified by affidavit and may be for any or all of the following causes:" specifying nine different causes. We quote again: "If the finding be in support of the remonstrance (on the seventh or eighth causes) above enumerated, the proceedings shall be dismissed." We quote further from the same section: "If there be no remonstrance, * * * the court shall make an order declaring the proposed

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work established, and approving the assessments, and shall direct some one of the commissioners to construct and make the proposed work."

There is no provision of our drainage statutes which authorizes the petitioner for a drain to dismiss his cause at any time, of his own motion. Appellant's counsel concede this, but they say, and correctly so we think, that "some at least of the provisions of the code are applicable to drainage proceedings." *Neff v. Reed*, 98 Ind. 341. Counsel cite and rely upon the *first* clause of section 333, R. S. 1881, which provides that a plaintiff may dismiss his suit, without prejudice, before the jury retires, or, if the trial is by the court, at any time before the finding of the court is announced. On the other hand, it is claimed by appellee's counsel that the report of the commissioners of drainage is to be regarded as a verdict, and they cite several cases from our own reports, where it was held that the report of commissioners in partition would stand as a verdict until set aside for cause shown. *Lucas v. Peters*, 45 Ind. 313; *Kern v. Maginniss*, 55 Ind. 459; *Clark v. Stephenson*, 73 Ind. 489.

There is such a wide difference between the report of commissioners for partition and that of drainage commissioners, that the cases cited by counsel can not be regarded as in point here. In partition cases, the commissioners' report generally comes in after the litigation is ended and the rights of the parties determined; while in drainage cases, the commissioners' report, as a rule, is the foundation of the litigation.

We are of opinion that in drainage cases the modes of procedure and the rules of practice prescribed by the civil code may properly be used to supply omissions in the drainage statutes. We think, also, that section 333, *supra*, should be held applicable to drainage cases, and that, under the provisions of such section, the petitioner for a drain may dismiss his case and withdraw his petition, if his motion to that end be made at the proper time. The difficult question in the case, of course, is to determine what is the proper time. What

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we are required to decide in the cause before us is, whether or not the appellant was entitled to a dismissal of the case at the time he made his motion. When the report of the commissioners of drainage was filed, the statute and the court, as we have seen, allowed ten days to any owner of lands affected by the work proposed, to remonstrate against such report. Doubtless, within those ten days, as an owner of lands affected by the proposed work, the appellant might have remonstrated against the report of the drainage commissioners, and, perhaps, during the same time, he might have successfully moved the court for leave to dismiss the cause and withdraw his petition, though this point we need not and do not decide.

But the ten days given by the statute and court were allowed to elapse, and within that time no remonstrance was filed, nor was any other action asked for, had or taken in the case by the appellant or any of the appellees. The cause was then ready for final judgment, and, under the statute, as we have seen, it was then the imperative duty of the court to make an order declaring the proposed work established and approving the assessments, and to direct some one of the commissioners to construct and make the proposed work. After the lapse of the period allowed by the statute for filing remonstrances against the commissioners' report, we have held that it was then too late for any owner of lands affected by the work proposed to remonstrate against such report. *Hays v. Tippy*, 91 Ind. 102. So, we think, it must be held in the case in hand, that after the lapse of such statutory period, without remonstrance or other objection, and when the cause is ready for final order and judgment, it is then too late for the petitioner to obtain leave of the court to dismiss his case and withdraw his petition.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Jan. 9, 1886.

Clouser v. Ruckman, Administrator.

No. 12,066.

CLOUSER v. RUCKMAN, ADMINISTRATOR.

DECEDENTS' ESTATES.—Admissions of Decedent.—Evidence.—The admissions of a decedent against his own interest are competent evidence, whether accompanying any act or not.

SAME.—Discretion of Trial Court.—Practice.—To be available on appeal, it must affirmatively appear that the trial court abused its discretion in admitting the testimony of the parties as to matter concerning a decedent's estate.

INSTRUCTIONS TO JURY.—Not Error to Read Complaint to Jury.—The trial court may, without error, read the complaint in the action to the jury in the course of its instructions.

SAME.—Bill of Exceptions.—Motion for New Trial.—Practice.—Recitals in a motion for a new trial, or of the clerk, can not perform the office of any statement required to be incorporated in a bill of exceptions.

From the Wells Circuit Court.

A. N. Martin, H. L. Martin, W. A. Bonham and E. C. Vaughn, for appellant.

J. S. Dailey, L. Mock, J. A. New and J. W. Jones, for appellee.

ELLIOTT, J.—The appellee is a party to this action in a dual capacity, namely, in his own right and as the administrator of the estate of his deceased brother, James W. Ruckman. It appears from that part of the evidence which is incorporated in the record, that the deceased, in his lifetime, had executed to the appellee a mortgage upon personal property, and that after his death the appellee applied to the court for an order to turn the property over to him, and that this order was granted. The appellant, Clouser, brought this action to set aside this order and to obtain a judgment directing that the property be declared to be part of the assets of the estate of the decedent.

On the trial of the case the appellee was permitted to prove admissions made by the decedent. In this there was no error. The admissions of a decedent are competent against his representatives, no matter to whom they were made. *Slade v.*

104 588
140 370
140 437
141 558

104 588
149 639
104 588
164 341

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Leonard, 75 Ind. 171; *Eckert v. Triplett*, 48 Ind. 174 (17 Am. R. 735); *Denman v. McMahon*, 37 Ind. 214; *Bevins v. Cline*, 21 Ind. 37; *Wilcox v. Duncan*, 3 Ind. 146; 1 Greenl. Ev., section 189; 2 Best on Evidence (Morgan's ed.), section 500. Where admissions are made by a party against his own interest, it is not material whether they were or were not a part of the *res gestæ*, for self-disserving declarations are always competent against the party by whom they were made, whether accompanying any act or not.

It is contended by appellant that the trial court abused the discretion invested in it by requiring all the parties to testify as witnesses, but we think that he has not made this fact appear. The evidence is not all in the record, and, for aught that appears, it may have been a just and wise exercise of discretion to permit all the parties to testify. There are two very familiar principles which apply with invincible effect against appellant, and these principles are: 1st. He who alleges error must make it affirmatively appear; 2d. All reasonable presumptions are made in favor of the rulings of the trial court.

We can not reverse the judgment upon the ground that the court read the appellant's complaint to the jury in the course of its instruction, for the pleadings are, in contemplation of law, always before the jury.

There is no bill of exceptions showing that the court was requested to instruct in writing, and we can not examine the question whether the instructions are or are not in writing. Recitals in a motion for a new trial can not perform the office of a statement required to be incorporated in a bill of exceptions, nor can the recital of the clerk take the place of such a statement.

Judgment affirmed.

Filed Jan. 8, 1886.

Morgan Civil Township v. Hunt.

104 590
e168 585

No. 12,542.

MORGAN CIVIL TOWNSHIP v. HUNT.

DRAINAGE.—*Remonstrance.*—*Verification.*—*Amendment.*—*Practice.*—A remonstrance filed, but not verified as required by statute, within the time allowed for remonstrating, can not be amended as to the verification after the lapse of such time, but will be stricken out.

SAME.—*Appeal.*—*Notice to all Persons Assessed not Necessary.*—It is not necessary on appeal to the Supreme Court, by one affected by a drainage proceeding, to notify all the persons against whom benefits were assessed of such appeal.

From the Porter Circuit Court.

A. D. Bartholomew and *E. D. Crumpacker*, for appellant.

W. E. Pinney, for appellee.

MITCHELL, J.—On the 10th day of April, 1884, Franklin W. Hunt filed his petition in the circuit court of Porter county praying for the establishment of a ditch. It was averred in the petition that, among other benefits, the ditch when constructed would be of great public utility in draining three public highways in Morgan township.

The petition was, after due notice, referred to the commissioners of drainage. From the report of the commissioners, to whom the matter was referred, it appeared that two highways, which are not particularly described, would each be benefited to the amount of eighty dollars.

Within ten days after the filing of this report, what purports to be a remonstrance was filed on behalf of the township. It is not stated in the remonstrance that the township is the owner of any lands, or that any easements in lands will be affected by the construction of the proposed ditch, or that it is otherwise interested in its construction.

The remonstrance was signed by attorneys for the township, and was not verified. After the expiration of ten days the petitioner moved to strike out the remonstrance, on the ground that it was not verified as the statute required. With-

Morgan Civil Township v. Hunt.

out showing any excuse for the failure to verify it within the ten days, the township trustee interposed a motion for leave to file an amended remonstrance. The amendment proposed was the verification of the paper originally filed as a remonstrance. This was refused, and the motion to dismiss was sustained. This ruling is complained of as erroneous. We think the ruling of the court was right. By the statute ten days are allowed after the filing of their report by the commissioners of drainage to the owners of lands affected by the proposed work within which to file a remonstrance. The statute prescribes that the remonstrance shall be filed within ten days, and that it shall be verified by affidavit. Assuming, but not deciding, that a civil township may remonstrate without averring that it is the owner of lands affected by the work proposed, or that it is otherwise interested in or affected by the proposed work, we are nevertheless of opinion that a remonstrance in substantial compliance with the statute must be filed within ten days.

A paper signed by attorneys, without verification by any one, or any attempt to do so, is not a substantial compliance.

In *Munson v. Blake*, 101 Ind. 78, it was held that a remonstrance might be verified by an agent or other person having authority to do so. Until it is verified in some manner by some one, we think it can not be regarded as a statutory remonstrance. *Hays v. Tippy*, 91 Ind. 102; *Crume v. Wilson*, *ante*, p. 583.

Proceedings for the establishment of a ditch are statutory. The right to remonstrate is given by the statute. The time within which the remonstrance is to be filed, who may remonstrate, the grounds upon which it may be predicated, and that it shall be verified by affidavit, are all prescribed by the statute.

Where a right is created by statute, and the mode of exercising it is prescribed, that mode must be pursued. *Storms v. Stevens*, *ante*, p. 46.

 Conger *et al.* v. Miller.

It will not do to say that an informal paper may be filed within ten days, and by that means the right to file a statutory remonstrance held open indefinitely. Whether a remonstrance, in substantial compliance with the statute, which is filed within ten days, may be amended, is a question not before us. A paper which lacks an essential statutory element of a remonstrance, however, can not be amended into such remonstrance after the expiration of ten days.

A motion to dismiss the appeal was made in this case, on the ground that all the persons against whom benefits were assessed were not notified of the appeal. We do not think this was necessary.

There was no error in the ruling of the court, and the judgment is accordingly affirmed, with costs.

Filed Jan. 20, 1886.

 No. 12,303.

CONGER ET AL. v. MILLER.

PLEADING.—Answer.—Cross Complaint.—A single pleading can not perform the two-fold function of an answer in bar and a cross complaint.

SAME.—A cross complaint, like a complaint, must be good within and of itself, without aid from other pleadings in the cause.

QUIETING TITLE.—Cross Complaint.—Sufficiency of.—A cross complaint to quiet title which does not so describe the real estate that it can be ascertained, except by reference to the other pleadings in the case, and does not aver that the opposite party claims any adverse interest, nor that his claim is unfounded or a cloud upon the cross complainant's title, is bad on demurrer.

SAME.—Partition.—Quere, whether a cross complaint to quiet title to real estate is a proper pleading in an action merely for partition.

From the Fulton Circuit Court.

S. Keith, for appellants.

G. W. Holman and *M. R. Smith*, for appellee.

104	592
194	472
104	592
133	202
104	592
144	634
104	592
148	456
149	163
150	606

Conger et al. v. Miller.

Howk, J.—This was a suit by the appellee, Miller, against the appellant Margaret E. Conger, as sole defendant. In his complaint, the appellee alleged that he was the owner in fee of the undivided two-thirds of twenty acres of land, particularly described, in Fulton county; that appellant Margaret E. Conger was the owner of the remaining one-third of such land; that appellee desired to have his share of the land set off to him in severalty, and he prayed for partition accordingly.

Afterwards, upon the verified petition of the appellant Margaret E. Conger, her husband, Samuel M. Conger, and her children, John T. Conger, Rebecca Wallace, Mary Dick, Ettie Conger, Anna Conger, Lewis Conger and Nora Conger, were made co-defendants with her in this suit, upon the alleged ground that they all had an interest in the land described in appellee's complaint. All such defendants jointly answered by a general denial of the complaint, and they all joined in a cross complaint against the appellee, wherein they asked that their title to the land in controversy might be forever quieted. To this cross complaint the appellee's demurrer, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained by the court. Afterwards, at the next term of the court, appellants withdrew their answer in general denial of the complaint, and thereupon, "the defendants each being three times called, in open court, come not, but herein make default." The cause was then heard by the court, and a finding was made for the appellee. An interlocutory order was made for the partition of the land described in the complaint, as prayed for therein, and commissioners were appointed by the court to make such partition. Afterwards, at the same term, such commissioners made and acknowledged, in open court, their report in writing of such partition, which was approved and confirmed by the court, and final judgment of partition was rendered thereon and in accordance therewith.

Conger *et al.* v. Miller.

The defendants have appealed to this court. They have assigned no error here which calls in question any of the proceedings in the partition suit. Indeed, so far as the record shows, no objection was made or exception taken to any of such proceedings.

The only error assigned by appellants is the sustaining of appellee's demurrer to their cross complaint. In their assignment of error, appellants' pleading is called their "cross bill or second paragraph of answer." It must be either the one or the other; it can not be both cross complaint and answer. It is settled by our decisions that no single pleading can be made to perform the two-fold function of an answer in bar, and a counter-claim or cross complaint asserting a cause of action: *Campbell v. Routt*, 42 Ind. 410; *Thompson v. Toohey*, 71 Ind. 296; *Anderson, etc., Ass'n v. Thompson*, 88 Ind. 405. If the pleading in question were considered as a paragraph of answer, it would be clear that the sustaining of the demurrer thereto, even if erroneous, would have been at most a harmless error, because every material fact stated in such paragraph could have been given in evidence under the answer in general denial, which was still in the record when the demurrer was sustained, and its subsequent withdrawal would not have rendered the ruling on the demurrer an available error.

We think, however, that appellants' pleading is, and was intended to be a cross complaint, and that it must be so considered here in determining the question of its sufficiency. In such pleading, appellants prayed for affirmative relief, asking therein that their titles might be quieted, and that, of itself, is sufficient to characterize the pleading as a cross complaint. A cross complaint, like a complaint, must be good within and of itself, without aid from other pleadings in the cause. *Campbell v. Routt*, *supra*; *Masters v. Beckett*, 83 Ind. 595. In *Ewing v. Patterson*, 35 Ind. 326, it is said: "The only real difference between a complaint and a cross complaint is, that the first is filed by the plaintiff and the second by the

Conger *et al.* v. Miller.

defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up of the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other. When a defendant files a cross complaint and seeks affirmative relief, he becomes the plaintiff, and the plaintiff in the original action becomes the defendant in the cross complaint."

It is clear, we think, that a cross complaint to quiet title to real estate, to be sufficient on demurrer within and of itself, must state all such facts as are required in a complaint for the same purpose. Our civil code provides (section 1070, R. S. 1881) who may sue, and against whom and under what circumstances the suit may be brought to quiet the title to real estate. In *Second Nat'l Bank, etc., v. Corey*, 94 Ind. 457, in considering the question of the sufficiency, on demurrer, of a complaint to quiet title to real estate, after quoting section 1070, *supra*, and noting the fact that it was a reenactment of section 611 of the civil code of 1852, the court said: "Its provisions have been liberally construed by this court. While it has been held, that the plaintiff need not state in his complaint, with much particularity, the nature of the title or interest claimed by the defendant, in or to the real estate in controversy, yet it has been uniformly held that the complaint must show, that the defendant's claim is adverse to the title asserted by the plaintiff, or is unfounded, and a cloud upon the plaintiff's title. *Marot v. Germania, etc., Ass'n*, 54 Ind. 37; *Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind. 383; *Schori v. Stephens*, 62 Ind. 441."

In *Exchange Bank v. Ault*, 102 Ind. 322, it was said to be "at least doubtful" whether a cross complaint to quiet title to real estate was a proper pleading in an action merely for partition. This question was not before us in the case cited, nor is it now presented, but we still consider it exceedingly doubtful whether such a cross complaint is a proper or admissible pleading in an action for partition merely, because its object

 Hadlock *et al.* v. Gray.

and purpose are wholly foreign to and have no connection with the object and purpose of the original action. Passing this point, however, we are of opinion that, under the decisions of this court hereinbefore cited, the appellants' cross complaint in this case was radically insufficient, and that the demurrer thereto was correctly sustained. Without reference to or aid from the other pleadings in the case, the real estate which appellants were seeking to quiet the title to could not possibly be ascertained or described. Nor did it appear from any averment in the cross complaint, that the appellee claimed any title to or interest in any real estate adversely to the appellants, nor that appellee's claim was unfounded or a cloud upon their title to any real estate.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Jan. 20, 1886.

 No. 12,235.

HADLOCK ET AL. v. GRAY.

104	626
133	418
104	525
135	188
104	596
144	5
147	97
104	596
154	86
104	596
159	180

REAL ESTATE.—Deed.—Construction of.—Life-Estate.—A deed which conveys and warrants to I. and M., husband and wife, certain real estate, and which provides that "after the decease of the said I. and M., the said property to be equally divided between the heirs of said I. and the heirs of M.; if said I. shall die before his wife she is to hold the said property until her death, and provided M. shall die first, then I. is to hold said property until his death, and at the death of both it is to be divided as above stated," vests in the grantees a life-estate for the lives of both.

SAME.—"Heirs."—The word "heirs," as used in the sense above stated, means heirs apparent, who shall take the remainder as soon as the life-estate ends.

From the Fulton Circuit Court.

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M. L. Essick, O. F. Montgomery, M. R. Smith and G. W. Holman, for appellants.

J. S. Slick and S. Keith, for appellee.

ELLIOTT, J.—The appellee alleges in his complaint that he is the owner of the real estate therein described, and that his title rests upon a deed executed to him in January, 1878, by Isaac Cannon, who has since died; that Isaac Cannon's title was founded upon a deed executed to him and his wife, Mary Cannon, by Charles Jackson and wife, on the 20th day of April, 1876; that this deed, omitting the formal parts, reads thus: "This indenture witnesseth, that Charles Jackson and Catharine Jackson, his wife, of Fulton county, in the State of Indiana, convey and warrant to Isaac Cannon and Mary Cannon, for the sum of twelve hundred dollars, the following real estate in Fulton county, Indiana, to wit: Lot number one hundred and eighty-two, as designated on the plat of Shryock & Bozarth's addition to the town of Rochester, with all the appurtenances thereunto belonging, the said Isaac Cannon to pay all taxes thereon from the day of sale. After the decease of said Isaac Cannon and Mary Cannon, the said property to be equally divided between the heirs of said Isaac Cannon and the heirs of Mary Cannon. If said Isaac Cannon shall die before his wife she is to hold the said property until her death, and provided Mary Cannon shall die first, then Isaac Cannon is to hold said property until his death, and at the death of both it is to be divided as above stated." It is also alleged that both Isaac and Mary Cannon are dead; that the deed of the former was made after the death of his wife; that the appellants are the children and grandchildren of Isaac and Mary Cannon; that they claim title to the real estate; that they have, in fact, no title, and that the appellee is entitled to a decree quieting his title. The prayer is, that appellee's title be quieted, and that the appellants be decreed to have no interest in the real estate.

Hadlock *et al.* v. Gray.

The controlling question in the case turns upon the effect to be given the deed executed to Isaac and Mary Cannon. If that deed vested a fee in them as tenants in entirety, then the judgment below was right; if it vested in them a life-estate for the lives of both, then the judgment is wrong. Our opinion is, that the deed vested in them a life-estate and nothing more.

It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. *Davis v. Clark*, 26 Ind. 424; *Dodge v. Kinzy*, 101 Ind. 102, *vide* authorities cited p. 105. But while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the others, although the grantees may be husband and wife. Washburn says, in speaking of conveyances to husband and wife, that "It is always competent, however, to make husband and wife tenants in common, by proper words, in the deed or devise by which they take, indicating such an intention." 1 Washb. Real Prop. 674.

Another author says: "And furthermore, if at any time a joint tenancy or tenancy in common is desired to be created between man and wife, a joint estate will be treated as such, if that intention is clearly expressed in the deed or will." Tiedeman Real Prop., section 244.

The principle which we have asserted is thus declared by an author whose work for more than half a century has been

Hadlock *et al.* v. Gray.

regarded as authority: "In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do." 1 Preston Estates, 132.

The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. Our conclusion need not, however, be placed on this ground, as the whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife.

The deed does not contain the language essential to vest in the first taker an estate in fee under the rule in *Shelley's Case*. There are no words in the deed conveying to Isaac and Mary Cannon and their heirs the estate; on the contrary, the conveyance is to them for their joint lives, with the provision that upon the termination of the life-estate the land shall be divided among their heirs. When the word "heirs" is used, as it is in this instance, it does not designate those who shall take in indefinite succession, but it designates persons who shall take the remainder as soon as the life-estate ends. When that word is employed in the sense in which it is here used, it means heirs apparent, and not heirs. We have in recent cases given this question careful consideration, and we do not deem it necessary to again discuss it. *Fountain County C. & M. Co. v. Beckleheimer*, 102 Ind. 76 (52 Am. R. 645); *Shimer v. Mann*, 99 Ind. 190, *vide* auth. p. 193 (50 Am. R. 82).

There is no reason why the clearly expressed intention of the parties to the deed should not prevail, for neither the rule in *Shelley's Case*, nor any other rule of law, opposes the way of the court to a natural and reasonable construction of the deed, and surely no one who reads the deed can doubt that it

The L., N. A. and C. R. W. Co. v. Indianapolis and Westfield G. R. Co.

was intended to vest a life-estate, and not a fee, in Isaac Cannon and his wife.

What we have said disposes of the whole case, for it is impossible that a valid judgment can rest on a complaint utterly and irreclaimably bad.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and to proceed in accordance with this opinion.

Filed Jan. 9, 1886.

No. 12,263.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. INDIANAPOLIS AND WESTFIELD GRAVEL
ROAD COMPANY.

From the Boone Circuit Court.

W. Irvin and C. S. Wesner, for appellant.

R. R. Stephenson and T. E. Boyd, for appellee.

Howe, J.—No question was properly saved by the appellant in the record of this cause, and its counsel have presented no question for our decision. On the 21st day of July, 1885, appellant's counsel asked and obtained from this court an extension of thirty days in which to file their brief of this cause. Since the expiration of the time allowed more than four months have elapsed, and counsel have not filed their brief. In this state of the case this appeal must be and is dismissed, with costs.

Filed Dec. 30, 1885.

In Memoriam.

Comes now Hon. David Turpie, and presents the action taken at a meeting of the members of the Bar of this State, *in memoriam* of the life and character of Hon. THOMAS A. HENDRICKS, late Vice-President of the United States, and moves that these proceedings be entered upon the records of this court. The motion is granted, and the proceedings are now here entered of record as follows:

PROCEEDINGS

OF THE MEETING OF THE MEMBERS OF THE STATE BAR,
HELD UPON THE OCCASION OF THE DEMISE OF THE LATE
THOMAS A. HENDRICKS, VICE-PRESIDENT OF THE UNITED
STATES.

Upon the 30th day of November, 1885, a very large number of the members of the Bar of the State of Indiana having met at 2 o'clock P. M., at the Federal Court-room in Indianapolis; present the Hon. William A. Woods, Judge of the United States District Court of the State of Indiana, and the other officers thereof.

The Hon. Solomon Claypool, addressing the court, moved that the Hon. W. Q. Gresham, Judge of the United States Circuit Court, act as chairman of the meeting, which motion prevailed.

Judge Gresham, in taking the chair, delivered a brief address upon the subject of the meeting, when, upon motion of W. H. H. Miller, Esq., William A. Ketcham, Esq., of the Indianapolis Bar, was chosen Secretary.

The Hon. David Turpie, chairman of the committee on

resolutions, reported for consideration the following memorial annexed, as commemorative of the life, character and public services of the deceased, and moved its adoption.

The motion was seconded by the Hon. Joseph E. McDonald, and after remarks by Messrs. Turpie, McDonald, Williamson, Frazer, Mack, Cravens, Coffroth and Love, and by Judge Elliott, of the Supreme Court of the State, was unanimously carried.

Upon motion of Hon. Joseph E. McDonald, Hon. David Turpie, chairman of the committee upon resolutions, was directed to present a copy thereof and of these proceedings for record in the Circuit Court of the United States and the Supreme Court of the State, and the Secretary of the meeting was directed to send a copy of the memorial and these proceedings to the family of the deceased.

The meeting then adjourned.

W. Q. GRESHAM, *Chairman.*

W. A. KETCHAM, *Secretary.*

BAR MEMORIAL TO THOMAS A. HENDRICKS.

THOMAS A. HENDRICKS was born September 7th, 1819, in Muskingum county, Ohio. In 1820 his parents removed to Indiana, first to Madison, then to Shelbyville, near which they permanently resided. His boyhood and youth were spent in Shelby county on his father's farm. They were those of a pioneer, of an early settler in a sparsely populated region, of what was then known elsewhere as the far West. His life was thus, in every circumstance, coincident with the morning of the State, the beginnings of civilization in a new commonwealth. Receiving at home a course of common school education, he subsequently attended and graduated at Hanover College, in Jefferson county. Choosing the law as a profession, he prosecuted his studies partly at Shelbyville, partly at Chambersburgh, Pa., but was admitted to the bar and commenced the practice at Shelbyville in 1843. His first public position was attained in 1848, by an election, un-

solicited, to the House of Representatives of the General Assembly. Having served one term, and, declining further service therein, he was, in 1850, elected a member of the Constitutional Convention, being one of the youngest members of that body, and having in his associates many of the men most eminent in public life at that period.

In August, 1851, he was elected a representative in Congress and served two terms.

In August, 1855, he was tendered and accepted from President Pierce the position of Commissioner of the General Land-Office, at Washington, wherein he served nearly four years, resigning in the year 1859.

As the unanimous choice of his party, on the 12th day of January, 1863, he was elected a Senator of the United States for the term of six years, commencing on the 4th day of March, 1863, when he took his seat as such. He soon became in that distinguished body the recognized leader of his party, alike fitted for counsel and debate, endowed with that rare union of qualities, an equal proportion of caution and courage, so much needed in the conduct of a parliamentary opposition.

In 1872 he was elected Governor of Indiana, the first of his political party chosen to such a position after the close of the War, in any northern State. As Governor he originated the system of making and preserving in that department a permanent record of executive action upon all applications before him. His administration was distinguished for more than ordinary attention to the cause of popular education, for the humane appeals by the executive in behalf of the benevolent institutions of the State, appeals which met a response from the General Assembly alike creditable to themselves and their constituents.

In 1877, and again in 1884, he visited Europe, travelling through the British islands and the principal countries of the continent. A single remark made upon his return from his first tour, "that the French were a people much attached to their country, not at all to their institutions of government,"

shows the habit of thoughtful observation which characterized even his leisure.

In 1884 he was elected Vice-President of the United States, and entered upon his duties as such on the 4th day of March, 1885, serving as the presiding officer of the Senate during the brief executive session held under the new administration.

From the farm-house to the Vice-Presidency—such was the commencement and end of a career untouched by dishonor, unclouded by suspicion. His public acts as a Senator and Representative in Congress have gone into history. His record has received the highest possible commendation and approval from the vast constituency he served, by his subsequent preferment to the second office in the gift of the Nation—from the consideration, also, that begun in one age, his countrymen of another generation arose to do him honor and to complete the full-orbed cycle of his fame.

Mr. Hendricks was, throughout the whole period of his active life, a lawyer, even in his last days concerned in the conduct of causes. His entrance upon and employments in public life were episodes, excursions useful to himself and others, but did not divert him from the beaten path of forensic labor. On the floor of the Senate, in the halls of legislation, he sojourned; at the bar, in the courts, he dwelt. He was engaged in very much of the important litigation at the capital of his State. His practice was by no means local. He attended, in the discharge of his professional duties, nearly every circuit in our own, and many of the higher courts of adjoining States and the Supreme Court at Washington. Much of his life, however, was non-professional. His time and thought were, at very frequently recurring intervals, given to the work of the hustings. There was something in the mere aspect of a large popular assembly which had for him a special attraction. His manner in addressing a mixed audience was peculiarly his own—neither that of conversation nor oratory; something better suited than either to his purpose. He was one of the most impressive and successful of public canvassers. Nor did he disregard the unconsidered trifles of the campaign. There was an affluent

grace in his salutations which largely supplemented argument. He was, moreover, a man of normal action and opinion, following the ordinary bent and tenets of his party; no fanatic, zealot, or extremist upon any subject, not such a one as the multitude often follow, but a character smoothly rounded to completeness, without edges or angles, with no corners in his creed political; yet he was and continued to be a popular favorite to the last.

To the stores of information acquired by extensive travel and intercourse, both at home and abroad, he added a close acquaintance with the works of the best authors, being a careful habitual reader of books, not less than of men. His literary taste was highly cultivated. His excellence as a writer, manifest enough in his messages and state papers, would have earned particular recognition, but that it had been overshadowed by his more imposing reputation as a public speaker.

In religion he was an Episcopalian, an active member and officer for many years of St. Paul's Church, Indianapolis. Upon this subject he was firm in his conviction, in his life consistent, in his Christian profession unobtrusive. He walked with humility in faith. A man much given to charity, and of the most enlightened and liberal tolerance; nevertheless, he was strongly attached to his church, to his party, to his State, giving voice often with emphasis to his affection, that men might note not him but these, the so greatly revered objects of his devotion and regard.

The virtues of his private life were such as may be most commended in the friend, the neighbor, and the citizen. He was naturally of a disposition sedate, though cheerful; in address urbane; in manner extremely affable, but with dignity; in conversation pleasing; in society attracting, but not engrossing, the attention of others; to woman deferential with a high degree of courtesy unforced, indicative of respect and interest. Such was Hendricks.

Discerning the man, his life and acts at large, in the mass, in that respect, too, most nearly concerning ourselves, we may say, with verity, he was pre-eminently a product of Indiana,

an offspring of the State, a growth of its laws and institutions, and that the just pride taken in him by the people of this commonwealth was entertained not without reason for a fellow-citizen so illustrious.

He died in this city, where he would have wished to die, where he most really lived, at home, surrounded by those whom he loved; in the metropolis of the State which he had served so long, and by which he had been so often and so highly honored. Not without unavailing sorrow for a calamity so grievous, do we tender to his bereaved consort and the kindred of his household, our profound condolence and sincerest sympathy in the irreparable loss which has befallen them.

DAVID TURPIE,
A. L. ROACHE,
A. C. HARRIS,
NOBLE C. BUTLER,
CHAS. L. HOLSTEIN,
Bar Memorial Committee.

H. D. PIERCE, *Sec'y.*

Mr. Turpie also moved that an order be made directing that the proceedings herein above set forth be published with the reported decisions of this court and as a part of its official proceedings.

To this motion Chief Justice NIBLACK, on behalf of the court, responded as follows:

"It has not been the custom of this court to cause the proceedings taken by the Bar of the State upon the death of any of its members, however distinguished, to be published with the reports of its decisions, unless the person in whose memory the proceedings were held, at the time of his death, or at some previous time, had some official connection with the court. The precedent which has been thus observed is one which we think ought not to be departed from except in a strongly exceptional case.

"Mr. Hendricks was, for more than a third of a century, a practicing attorney of this court, distinguished alike for his high personal character and for his professional ability.

Having, in addition, filled the highest official positions which the State could confer upon him, as well as places of high trust under the national government, and having been Vice-President of the United States at the time of his death, we regard the proceedings now before us as of much more than ordinary interest, to the legal profession and to the public generally. The case presented is one in which an eminent lawyer and an honored member of this Bar had well nigh reached the highest official distinction known to our form of government. We, consequently, feel justified in treating the occasion as a strongly exceptional one, and in directing that the proceedings be published, as requested, with our reported decisions.

“It is accordingly so ordered.”

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- "the accused shall have a right to demand the nature and cause of the accusation against him." *Riggs v. State*, 261
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each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal," is erroneous. *Ib.*

14. *Personal Appearance Not Evidence of Age.—Instruction to Jury.*—In a prosecution for allowing a minor to play the game of pool, an instruction to the jury that, "In determining whether or not the defendant believed this man was of the full age of twenty-one years, you will take into consideration all the evidence in the case, the opinions of the witnesses as to his age, and, in connection with that, you may take into consideration *his appearance, as developed whilst testifying on the stand before you,*" is erroneous. *Bird v. State, 384*
15. *Appeal from Justice of the Peace.—Dismissal.—Jurisdiction.*—Upon appeal to the circuit court from a judgment of conviction in a criminal case before a justice of the peace, the circuit court acquires complete jurisdiction of the case, and, without its consent, the defendant can not dismiss his appeal. *Wischart v. State, 407*
16. *Forgery.*—A forged instrument reading, "Mr. Allen—Please let A. Garmire have team to go to Mongo, and charge same to me." (signed) "T. Hudson," is within the statute defining the crime of forgery. *Garmire v. State, 444*
17. *Same.*—It is sufficient in such cases if the instrument bears such a resemblance to the document it is intended to represent as is calculated to deceive. *Ib.*
18. *Same.—Indictment.—Mistake in Designating Character of Instrument.*—Where an instrument is set forth, a mistake of the pleader in designating its character does not vitiate the indictment. *Ib.*
19. *Same.—Statement of Intent.*—An allegation in the indictment, that the instrument was forged and uttered with the "felonious intent to feloniously cheat and defraud," etc., is a sufficient statement of the criminal intent. *Ib.*
20. *Same.—Erroneous Date of Instrument.—Statute of Limitations.*—One who has forged a written instrument can not avail himself of the fact that a wrong date was prefixed thereto, but the true date, showing that the statute of limitations has not run, may be alleged in the indictment. *Ib.*
21. *Same.—Witnesses.—Expert.—Statute.*—Section 1801, R. S. 1881, refers to expert witnesses, and does not apply to a case where the witnesses testify as to facts within their own knowledge. *Ib.*
22. *Same.—Continuance.—Temporary Postponement.*—The several statutory provisions concerning the continuance of causes have reference as well to the temporary postponement of the trial as to a continuance for the term, and when a cause is postponed until a later day in the term, it is in legal contemplation continued. *Morris v. State, 457*
23. *Same.—Matter of Right.—Supreme Court.—Practice.*—Neither a continuance for the term nor a postponement can be demanded as a matter of right, except upon cause shown; and in a criminal case where, immediately following the return of an indictment, the defendant, being in court, moves for a postponement till the following day, which motion is not supported by affidavit or other affirmative showing, the refusal of the trial court to sustain such motion will not be reviewed by the Supreme Court. *Ib.*
24. *Indictment.—Venue.*—An indictment which alleges the commission of a crime in a certain county, but which does not name the State in the body thereof, sufficiently lays the venue, if the State is named in the

- caption and upper marginal title, which are a preliminary part of the indictment. *Anderson v. State*, 467
25. *Same.—Rape.—Instruction.—Theory and Testimony of Defendant.*—Where, in a trial on an indictment for rape, the defendant testifies that the act of intercourse took place, but with the consent of the prosecuting witness, he thereby commits himself to that line of defence, and the court in instructing the jury may assume that such act of intercourse occurred. *Ib.*
 26. *Same.—Moral Character and Reputation for Chastity of Prosecuting Witness.*—For instructions on this subject see opinion. *Ib.*
 27. *Attempted Escape of Defendant.*—An instruction to the effect that if the defendant, while in the custody of the sheriff, attempted to escape from such custody, this would be a circumstance to be considered by the jury in connection with all the other evidence, to aid them in determining the question of guilt or innocence, is proper, there being evidence tending to prove such attempt. *Ib.*
 28. *Same.—Testimony of Defendant.—Credibility of Witnesses.*—An instruction to the effect that the defendant's testimony should be weighed as that of any other witness, and that his interest, his manner, and the probability or improbability of his testimony should be considered, with all the other circumstances, states the law correctly. *Ib.*
 29. *Same.—Presumption of Innocence.—Reasonable Doubt.*—An instruction that "the rule of law which throws around the defendant the presumption of innocence, and requires the State to establish beyond a reasonable doubt every material fact averred in the indictment, is not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law, which is intended for the protection of the innocent, and to guard so far as human agencies can against the conviction of those unjustly accused of crime," is not erroneous. *Ib.*
 30. *Same.—Instruction.*—In a trial on an indictment for rape, where the act of intercourse is admitted by the defendant in his testimony, the failure of the court to instruct the jury that they may find the defendant guilty of assault and battery, or assault and battery with intent to commit a rape, is not error. *Ib.*
 31. *Same.—Rape.—Degree of Resistance Required of Prosecuting Witness.*—In a prosecution for rape it is incumbent on the State to show that the prosecuting witness had resisted with all the means within her power, but the nature and extent of resistance which ought to be reasonably expected in each particular case depend upon the peculiar circumstances attending it. *Ib.*
 32. *Same.—Misconduct of Prosecuting Attorney in Opening Statement.—Practice.*—While the use of opprobrious epithets toward the defendant by the prosecuting attorney in his opening statement is such a breach of professional decorum as would justify the trial court in restraining him, yet it is not of sufficient importance to justify the Supreme Court in a reversal of the judgment. *Ib.*
 33. *Same.—Right of Jury to Determine the Law.*—While in a criminal case the jury may determine the law for themselves, they are not, strictly speaking, the sole judges of the law of the case, neither may they disregard the law; and an instruction which informed the jury that, "even if all the facts alleged in the indictment are established beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offence under the laws of the State, and if you determine that they do not, you have the right to acquit the defendant," was properly re-

- fused, as implying an unnecessarily extreme construction of the constitutional right of a jury in a criminal case. *Ib.*
34. *Prosecutions for Felony.—Indictment.—Information.*—Prosecutions for felony must be by indictment, except in the cases where the statute expressly provides that they may be by information, and such statute must be strictly construed. *State v. Boswell, 541*
35. *Same.—Grand Jury.—Failure to Return Indictment.—Effect of.*—Where a person accused of crime has been recognized to appear at the following term of court, and where the grand jury sitting at that term fails to find an indictment against him, a subsequent prosecution by information is unauthorized and not allowed. *Ib.*
36. *Same.*—The failure of a grand jury to find an indictment against one accused of crime, and recognized to appear at that term of court, does not necessarily work an acquittal, nor does it prevent his being placed under recognizance, in a second preliminary examination, where he has been arrested on a subsequent affidavit made by a competent person. *Ib.*
37. *Prosecutions Before Justices of the Peace.—Arraignment.*—In a prosecution before a justice of the peace, a mere failure to arraign the accused is not an available error. *Johns v. State, 557*
38. *Same.—Plea Necessary.*—A trial in a criminal case before a justice of the peace without a plea is erroneous. *Ib.*
39. *Same.—Presumption that Plea was Entered.*—Where the record discloses nothing as to the plea, it will be presumed that one was required and interposed. *Ib.*
40. *Same.—Appeal.—Practice.*—Where there has been a plea before the justice of the peace, no further plea is required in the circuit court on appeal. *Ib.*
41. *Same.—Obstructing Public Highway.—Character of Way.—Evidence.—Statute Construed.*—Section 1811, R. S. 1881, which provides that in a prosecution for obstructing a public highway, "it shall be sufficient to prove that it is used and worked as such," does not make such proof conclusive as to the character of the way, but merely makes it sufficient, in the absence of countervailing evidence, to sustain the charge. *Ib.*
42. *Same.—Instructions to Jury.—Supreme Court.—Practice.*—Where the evidence is not in the record, the Supreme Court will not deem an instruction erroneous if it would be correct in any supposable state of the evidence. *Ib.*

DAMAGES.

- See ANIMALS, 2; COUNTY SUPERINTENDENT, 2, 3; EVIDENCE, 6, 8, 9, 16, 18, 23, 29; EXEMPTION, 3; PROMISSORY NOTE, 4; RAILROAD; REAL ESTATE, 5; WATERCOURSE, 2.
1. *Negligence.—Action for Personal Injury.—Degree of Care Required of Plaintiff in Securing Medical Aid.*—One who is injured by the negligence of another is bound to use ordinary care and diligence in securing medical or surgical aid, and in case of a failure so to do, this should be taken into account in estimating damages, and no damages should be allowed for ailments or diseases that have resulted from the failure to use such care and diligence. *Louisville, etc., R. W. Co. v. Falvey, 409*
2. *Same.—Measure of.—Instruction.*—In an action by one who is injured by the negligence of another, an instruction that "It was the duty of the plaintiff to use ordinary care to cure and restore herself, and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in in-

clement weather, or otherwise, after receiving her injuries, if any she received in such accident, and thereby increased and aggravated such injuries, and enhanced their evil effects, you will take these facts into account in arriving at your verdict—if you find for the plaintiff—and should not allow any damages to plaintiff for any ailments, injuries or diseases, or their aggravation, from which plaintiff has been or may be suffering by reason of such exposure, and from which she would not otherwise be suffering," correctly states the law. *Ib.*

3. *Same.—Predisposition to Disease.—Instruction.*—In an action for personal injuries, alleged to have been received by the negligence of others, an instruction, in effect, that, "If you find that the plaintiff received the injuries complained of, or any of them, in the manner alleged, and at that time she was predisposed to malarial, scrofulous or rheumatic tendencies, but otherwise in good health, and that said injuries, or any of them solely, excited or developed said predisposition to malarial, scrofulous or rheumatic tendencies, so that thereby, without the fault of plaintiff, her present condition, whatever you may find that to be, has directly resulted, then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be," correctly states the law. *Ib.*
4. *Same.—Measure of Damages.*—In such action, the jury, in estimating the amount of damages to which plaintiff is entitled, may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of the injuries, and physical and mental suffering caused by and arising out of such injuries. They may also consider the professional occupation of the plaintiff, and her ability to earn money. The plaintiff will be entitled to recover for any permanent reduction of her power to earn money by reason of such injuries, and the amount assessed should be such a sum as will in the judgment of the jury fully compensate the plaintiff for such injuries, or any of them so sustained. *Ib.*

DECEDENTS' ESTATES.

See PLEADING, 15; TOWNSHIP TRUSTEE, 1, 2.

1. *Discretion of Trial Court as to Evidence Concerning.*—The discretion with which the trial court is invested as regards testimony concerning matters affecting a decedent's estate, which occurred prior to the death of the decedent, must be determined upon the merits of each case. *Forgerson v. Smith, 246*
2. *Same.—Interested Witness.*—It is not an abuse of discretion to exclude a party from testifying as to oral declarations of the decedent, by which the witness expects to acquire property belonging to the decedent. *Ib.*
3. *Appeal.—Law of Case.—Practice.*—Where an appeal is perfected by an administrator under the law as previously declared by the Supreme Court, and under that law a motion to dismiss the appeal is overruled, that ruling, whether erroneous or not, is the law of the case, and a subsequent motion to dismiss, founded upon a different declaration of the law in another case, will be overruled. *Walker v. Heller, 327*
4. *Same.—Statement of Claim.*—Although the statute (section 2310, R. S. 1881) requires only "a succinct and definite statement" of the claim against a decedent's estate, such statement must contain sufficient facts to show *prima facie* that the estate is indebted to the claimant, or it is bad on demurrer. *Ib.*
5. *Same.—Claim Showing Cause of Action in Third Person.*—Where the statement shows a cause of action in favor of some person other than the claimant, it is bad on demurrer for want of facts. *Ib.*
6. *Same.—Trust.—Pleading.*—An allegation in a complaint against a de-

- cedent's estate, that the decedent died without having paid to the plaintiff certain money placed in his hands by a third person for the benefit of the plaintiff, and that it is due and unpaid, is sufficient after verdict to show that the decedent at his death, and his administrator upon the filing of the claim, still retained such money. *Ib.*
7. *Same.—Demand.*—The filing of a claim against a decedent's estate constitutes a sufficient demand against the administrator. It is not necessary to aver a previous demand. *Ib.*
8. *Final Settlement.—Collateral Attack.*—The approval by the proper court of the final settlement account of an administrator is an adjudication of all questions involved, and can not be collaterally attacked. *Carver v. Lewis, 438*
9. *Same.—Action Against Administrator after Discharge.—Omission of Property from Inventory.—Conversion.—Trusts.*—While the final settlement of a decedent's estate remains in force, it is conclusive upon the parties interested, and an action can not be maintained against the discharged administrator to recover the proceeds of notes, belonging to the estate, which he failed to include in the inventory and account for but converted to his own use. Nor can the fact that such notes were held by the administrator, before his appointment as such, as trustee for the decedent while living, change the case. *Ib.*
10. *Admissions of Decedent.—Evidence.*—The admissions of a decedent against his own interest are competent evidence, whether accompanying any act or not. *Clouser v. Ruckman, 588*
11. *Same.—Discretion of Trial Court.—Practice.*—To be available on appeal, it must affirmatively appear that the trial court abused its discretion in admitting the testimony of the parties as to matter concerning a decedent's estate. *Ib.*

DECLARATIONS.

See EVIDENCE, 8, 9, 12, 23, 24; TOWNSHIP TRUSTEE, 4.

DEED.

See REAL ESTATE; REAL ESTATE, ACTION TO RECOVER, 4, 6; TAXES, 1, 2, 6.

1. *Quitclaim.—Color of Title.—Notice.—Sheriff's Sale.*—A quitclaim deed executed by one having no title, *e. g.*, by one who has previously conveyed all his interest in the land, does not convey even color of title to one who takes with notice. One who buys at a sheriff's sale made on a judgment against the first grantee will take a quitclaim deed from the grantor with notice. *Wright v. Tichenor, 185*
2. *Real Estate.—Construction.—Life-Estate.*—A deed which conveys and warrants to I. and M., husband and wife, certain real estate, and which provides that "after the decease of the said I. and M., the said property to be equally divided between the heirs of said I. and the heirs of M.; if said I. shall die before his wife she is to hold the said property until her death, and provided M. shall die first, then I. is to hold said property until his death, and at the death of both it is to be divided as above stated," vests in the grantees a life-estate for the lives of both. *Hadlock v. Gray, 596*
3. *Same.—"Heirs."*—The word "heirs," as used in the sense above stated, means heirs apparent, who shall take the remainder as soon as the life-estate ends. *Ib.*

DEFAULT.

See JUDGMENT, 7, 9, 10

DELIVERY.

See PERSONAL PROPERTY; RAILROAD, 23.

DEMAND.

See DECEDENTS' ESTATES, 7; DRAINAGE, 1.

DEMURRER TO EVIDENCE.

1. *Admissions by.*—A demurrer to the evidence admits all facts which the evidence adduced by the adverse party tends to prove, or of which there is any evidence however slight, and all inferences which can be logically and reasonably drawn from the evidence.
Lake Shore, etc., R. W. Co. v. Foster, 293
2. *Same.*—Evidence adduced by the party demurring will not be considered, as by demurring he withdraws from the consideration of the court all evidence offered by him. *Ib.*
3. *Same.*—In passing upon the evidence demurred to, the court will not attempt to reconcile conflicts, and hence will not consider such evidence as is favorable to the demurring party, if there be any opposing evidence upon the same question of fact; neither will it weigh evidence to determine whether any particular fact is established, but will take as true every fact of which there is any evidence. *Ib.*
4. *Same.*—If the plaintiff call several witnesses to prove the same transaction, some of whom testify unfavorably to him, and others in his favor, the defendant by demurring to the evidence admits that the latter have told the truth, and so the court must take it though the jury might have believed the former. *Ib.*
5. *Same.*—On a demurrer to the evidence, forced and violent inferences are not admitted, but only such as a jury might draw, or which may be reasonably drawn, from the admitted facts. *Ib.*
6. *Exclusion of Competent Evidence.—Practice.*—By demurring to evidence the defendant does not deprive the plaintiff of the right to make available questions upon rulings excluding evidence.
Washburn v. Board, etc., 321

DESCRIPTION.

See EVIDENCE, 31; REAL ESTATE, 1 to 4; TAXES, 1, 2.

DILIGENCE.

See DAMAGES, 1.

DISCRETION.

See COUNTY SUPERINTENDENT, 2; DECEDENTS' ESTATES, 1, 2, 11; DRAINAGE, 6.

DIVORCE.

See HABEAS CORPUS, 3.

1. *To what Extent Proceeding is Special.*—Divorce proceedings are so far special as to allow all the provisions of the divorce act to have their full force, unaffected by the civil code. *Powell v. Powell, 18*
2. *Same.—To what Extent Code Applies.*—"Civil Cases" and "Civil Actions."—*Pleading and Practice.*—Divorce cases, having been of equitable cognizance before the adoption of the Constitution, are not included in the term "civil cases," as used in the Bill of Rights; but under section 1 of the civil code (being section 249, R. S. 1881), they are "civil actions" in such a sense that the rules of pleading and practice therein provided will apply, except to the extent that a different procedure may be provided in the divorce act, and to the extent that it may be apparent that the Legislature intended otherwise. *Ib.*
3. *Same.—Change of Judge.*—A divorce proceeding is a civil action in such a sense as entitles a party thereto, upon filing the proper affidavit, under section 412, R. S. 1881, to a change from the judge on the ground of bias and prejudice. *Ib.*

DOMESTIC RELATIONS.

See HABEAS CORPUS; HUSBAND AND WIFE.

DRAINAGE.

1. *Collection of Ditch Assessment.—Tax Duplicate.—Interest after Demand.*—When the county surveyor accepts work on a ditch, whether of shares allotted to residents or non-residents of the county, and issues his certificates of acceptance, he must file copies thereof with the county auditor, and the auditor must charge the amount mentioned in the certificates on the tax duplicate, to be collected as taxes are collected; and the holders of such certificates will be entitled to six per cent. interest thereon from demand until paid, or, if no demand has been made and the amounts thereof have been placed on the tax duplicate, from delinquency. *Storrs v. Stevens, 46*
2. *Same.—Action at Law.*—In such case, the amount of a certificate can not be collected, nor can the lien created by the certificate be enforced, by an action at law. *Ib.*
3. *Same.—Improving Natural Stream.—Legislative Power.*—The Legislature has power to enact a statute, such as that of April 8th, 1881, providing that natural streams may be improved. *Lips v. Hand, 503*
4. *Same.—Repeal.*—The drainage act of April 8th, 1881, was not repealed by the act of April 21st, 1881. *Ib.*
5. *Same.—Commissioners.—Irregular Appointment.—Bill of Exceptions.—Practice.*—Where the court approves the acts of drainage commissioners who are serving under its authority, it must appear by a proper bill of exceptions that timely objection, for any cause, was made to their action by the remonstrants; otherwise the rulings of the trial court will be respected. *Ib.*
6. *Same.—Report.—Time of Filing.—Discretion of Court.*—The trial court has discretionary authority to extend the time of filing the report of the drainage commissioners. *Ib.*
7. *Same.—Special Proceedings.—Trial by Jury.—Legislative Power.*—The Legislature has power to provide that in special proceedings the trial shall be by the court, and not by jury. *Ib.*
8. *Same.—Trial Governed by Statute in Force at Time.*—The statute in force at the time of the trial governs as to the procedure. *Ib.*
9. *Same.—Assessment of Benefits.—General and Special Benefits.*—In the assessment of benefits in drainage proceedings, the land-owner should not be charged with general benefits which accrue to him as a member of the community, but only with such as are special. *Ib.*
10. *Same.—What are Special Benefits.*—Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value. *Ib.*
11. *Same.—Outlet.—Lateral Ditches.*—Where the construction of a large ditch, or the improving of a natural stream, enables land-owners to carry their lateral ditches into it, and to thus secure good drainage without encroaching upon the rights of others, there is a special benefit. *Ib.*
12. *Same.—Act of April 8th, 1881, Constitutional.*—The drainage act of April 8th, 1881, providing for proceedings in the circuit court, is not unconstitutional as being in conflict with section 23 of the Bill of Rights because it denies the right of trial by jury, while the act of April 21st, 1881, relating to proceedings before the county commissioners, grants that right. *Ib.*
13. *Notice.—Collateral Attack.*—Where, in a drainage proceeding under the act of April 8th, 1881, there has been a notice of the general character

required by the statute, yet defective, the order of the court based on such notice is conclusive as against a collateral attack.

Jackson v. State, etc., 516

14. *Same.—Pleading.—Jurisdiction.*—In a proceeding to enforce a drainage assessment, it is not necessary to aver in the complaint that the defendant or his grantor was a party to the original proceeding, as by the assumption of jurisdiction in that proceeding and judgment by the court there was an adjudication of all jurisdictional questions. *Ib.*
15. *When Civil Procedure and Practice Applicable.*—The modes of procedure and the rules of practice prescribed by the civil code may be used to supply omissions in the drainage statutes. *Crume v. Wilson, 583*
16. *Same.—Dismissal by Petitioner.*—Under section 333, R. S. 1881, the petitioner for a drain may dismiss his case and withdraw his petition if his motion be made at the proper time. *Ib.*
17. *Same.—When Petitioner can not Dismiss.*—It is too late for the petitioner to obtain leave to dismiss, after the filing of the commissioners' report and the lapse of the statutory period for remonstrating, the cause being then ready for final judgment. Section 3, act of March 8th, 1883 (Acts 1883, p. 173). *Ib.*
18. *Remonstrance.—Verification.—Amendment.—Practice.*—A remonstrance filed, but not verified as required by statute, within the time allowed for remonstrating, can not be amended as to the verification after the lapse of such time, but will be stricken out. *Morgan Civil Tp. v. Hunt, 590*
19. *Same.—Appeal.—Notice to all Persons Assessed not Necessary.*—It is not necessary on appeal to the Supreme Court, by one affected by a drainage proceeding, to notify all the persons against whom benefits were assessed of such appeal. *Ib.*

EJECTMENT.

See EVIDENCE, 5; NEW TRIAL; REAL ESTATE, ACTION TO RECOVER.

EMBEZZLEMENT.

See PRINCIPAL AND AGENT, 2 to 4.

EMINENT DOMAIN.

See WATERCOURSE, 2.

EQUITY.

See DIVORCE, 2; HUSBAND AND WIFE; JUDGMENT, 3; PRINCIPAL AND AGENT, 3, 4; PROMISSORY NOTE, 8.

ESCAPE.

See CRIMINAL LAW, 27.

ESTOPPEL.

See DECEDENTS' ESTATES, 8, 9; EVIDENCE, 11; FORMER ADJUDICATION; JUDGMENT, 8, 10; MARRIED WOMAN, 3; REAL ESTATE, ACTION TO RECOVER, 5; WATERCOURSE, 1.

ESTRAY.

See ANIMALS.

EVIDENCE.

See BILL OF EXCEPTIONS; COUNTY COMMISSIONERS, 1; COUNTY SUPERINTENDENT, 5, 6; CRIMINAL LAW, 2, 7 to 12, 14, 21, 41; DECEDENTS' ESTATES, 1, 2, 10, 11; DEMURRER TO EVIDENCE; MARRIED WOMAN, 1; MALICIOUS PROSECUTION; RAILROAD, 16, 24; SLANDER, 1; TOWNSHIP TRUSTEE, 4; WITNESS.

1. *Undertaking to Defraud.—Admissions.*—Where two persons unite in a

- common undertaking to defraud another, the admissions of one are competent against both, although there is no direct evidence of a conspiracy. *Riehl v. Evansville Foundry Ass'n*, 70
2. *Same.—Sufficiency in Civil Cases.*—It is sufficient in all civil cases that the evidence supplies reasonable grounds for inferring facts essential to a recovery. *Ib.*
 3. *Same.—Admission without Objection.—Practice.*—Evidence admitted without objection in the trial court can not be questioned on appeal. *Ib.*
 4. *Pleadings.*—The pleadings in a cause, as well as the other papers constituting the basis of the action, are, before the court without being read in evidence. *School Town of Monticello v. Grant*, 163
 5. *Partnership.—Lease of Land for Particular Business.—Reple.—Action to Recover Real Estate.*—Where, upon the formation of a partnership to conduct the business of grape culture, one partner, in furtherance of the business, takes a lease for a term of fifty years to a part of the land to be used in such business and owned by the other, and then, upon a dissolution, by agreement a portion of the vineyard is set apart to the lessee in severalty, without any limitation as to its use, the latter may, in an action by him subsequently brought to recover its possession, prove its rental value for general purposes, and evidence offered by the defendant as to its rental value for grape culture only, is not admissible. *Campbell v. Hunt*, 210
 6. *Proof of Value of Gratuitous Services in Action for Injury.*—Although the attendants on one suffering from an injury render their services gratuitously, he may, in an action for damages, prove the value of such services. *Pennsylvania Co. v. Marion*, 239
 7. *Proof of Execution of Written Instrument.*—It is not necessary that the execution of a written instrument should be proved by direct evidence; it is sufficient if its execution is fairly inferable from the facts and circumstances established by the evidence. *Forgerson v. Smith*, 246
 8. *Personal Injury.—Expressions of Pain.*—Where it becomes important to illustrate the physical or mental condition of a person, either at the time an injury is received, or from thence to the time of an inquiry as to its nature and effect, expressions of present existing pain or malady, and of its locality, whether made at the time the injury is received or subsequent to it, are admissible in evidence, regardless of the person to whom they are made. *Cleveland, etc., R. R. Co. v. Newell*, 264
 9. *Same.—Statements to Physician after Commencing Action.—Expert.*—As the basis of his opinion, a physician may testify to statements made by a patient in relation to his symptoms and condition, both past and present, when received during and necessary to an examination with a view to treatment, or when necessary to enable him to give his opinion as an expert, although such statements are made after the patient has commenced an action to recover damages for the injury. *Ib.*
 10. *Agency.—Pleading.*—In an action to recover for work and labor performed for the defendant, evidence that the person who employed the plaintiff was the agent of the defendant, is admissible without averring the agency in the complaint. *Day v. Henry*, 324
 11. *Pleading.—Estoppel.*—A party can not give evidence of an affirmative defence of estoppel unless he has pleaded it. *City of Delphi v. Startzman*, 343
 12. *Declarations of Assignor of Promissory Note.*—The declarations of an assignor of a promissory note, made after he has parted with title and possession, are not admissible against his assignee. *Proctor v. Cole*, 373

13. *Expert Witness.—Hypothetical Question.*—A party, seeking an opinion from an expert witness, may assume in his hypothetical question such facts as he deems proved by the evidence, and it is for the jury to determine whether the facts are correctly assumed.
Louisville, etc., R. W. Co. v. Falvey, 409
14. *Same.*—It is only where there is no evidence at all in support of the facts assumed, or where the question is clearly irrelevant, or where it is merely speculative or improperly framed, that the court can interfere to prevent the propounding of a hypothetical question. *Ib.*
15. *Same.*—It is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses. The opinion of an expert witness must be based on facts, and not opinions. *Ib.*
16. *Same.—Permanency of Injury.*—It is competent to prove by expert witnesses the probability that the injury complained of will permanently impair the health and physical and mental ability of the plaintiff. *Ib.*
17. *Same.*—Where some of the facts assumed in a hypothetical question have been eliminated by a subsequent ruling of the court, but there still remain in evidence facts upon which an opinion may be properly based, it is not error to refuse to strike out the entire opinion, though such elimination may weaken the value of the opinion. *Ib.*
18. *Same.—Railroad.—Negligence.*—In an action against a railroad company for personal injuries alleged to have been caused by the negligent conduct of the defendant's servants, an expert medical witness was asked this question over the objection of the defendant: "State to the jury what fact you observed, what, if any, experiments you made, and what you learned to be the now condition, or the then condition, of the eyes and ear, and how it was done?" Held to be competent. *Ib.*
19. *Same.*—It is always competent to ask a medical witness what observations he made, and what was the condition of the patient he was called upon to examine, without regard to the purpose of the examination. *Ib.*
20. *Same.—Cross-Examination of Expert Witness.*—In cross-examining a medical expert, it is proper for the cross-examining counsel to state hypothetical cases, for the purpose of testing the skill and knowledge of the witness. *Ib.*
21. *Same.—Motion to Strike Out Testimony.—Separation of Competent from Incompetent Testimony.*—Where there is competent testimony given both in the examination in chief and on cross-examination, a motion made by the party by whom the witness was called to strike out all of such testimony should be overruled. It is the duty of such party to select the competent from the incompetent testimony, and to point out in his motion the specific testimony objected to, as well as to indicate the character of his objections. *Ib.*
22. *Same.—Objection to Medical Examination, Effect of.*—The fact that a plaintiff in an action for personal injuries objected to a medical examination of her person, ordered at the instance of the opposite party, can not affect the merits of the case, and should not be admitted in evidence. *Ib.*
23. *Same.—Medical Examination of Party.—Declarations of Present Pain.*—Declarations, indicative of present pain, made by a party to medical witnesses at the time of treatment or examination, are admissible. *Ib.*
24. *Same.—Declarations of Party During Course of Medical Examination.*—*Semble*, that where medical experts are ordered by the court to exam-

- ine a party on the motion of his adversary, what is said by such party during the course of such medical examination, in answer to questions asked by the medical experts, is admissible in evidence. *Id.*
25. *Same.*—*Medical Examination.—Experts.—Cross-Examination.—Practice.*—Where medical experts are ordered by the court to examine a plaintiff, in an action for injuries to the person, and such experts are called and questioned by the defendant as to the result of their examination, the plaintiff may ask on cross-examination how the examination was conducted, and what questions were propounded to the plaintiff. *Id.*
26. *Same.*—*Examination in Absence of Adverse Party.*—Evidence of an examination of a plaintiff by a medical witness is not rendered incompetent by the fact that the adverse party was not present when it took place; nor, if the examination is properly made, because it was made after the commencement of the action. *Id.*
27. *Same.*—*Proper Basis of Opinion by Expert.*—A medical expert, who has obtained knowledge of the facts of the case, and has stated the facts to the jury, may take them into consideration in giving his opinion, as well as facts communicated to him in a hypothetical question, and his opinion may rest in part on statements made by his patient. *Id.*
28. *Same.*—*Directions of Physician.*—In an action for personal injuries, it is proper for the plaintiff to prove the directions given her by her physician, and that she had obeyed them. *Id.*
29. *Same.*—*Proof of Plaintiff's Condition.*—Where the complaint states the character of the injuries received by plaintiff, and alleges permanent injury, it is proper, under these allegations, to give evidence of the mental and physical condition of the plaintiff. *Id.*
30. *Same.*—*Opinion of Witness as to Age of Party.—Impeachment.*—Where, on his examination in chief, a witness gives an opinion as to the age of the plaintiff, and on cross-examination is asked for and gives an opinion as to the age of a bystander, it is competent for the plaintiff to call such bystander and prove his age, for the purpose of showing the incapacity of the witness to correctly judge of a person's age. *Id.*
31. *Parol Evidence to Explain Abbreviations.*—Where land is described on a tax duplicate and in a tax deed in abbreviated terms, parol evidence is admissible to explain, consistently with such terms, as to what land they refer. *Barton v. Anderson, 578*

EXECUTION.

See CHANGE OF VENUE, 2; EXEMPTION; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6; SHERIFF'S SALE.

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES; PLEADING, 15; TOWNSHIP TRUSTEE, 1, 2.

EXEMPTION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; TAXES, 5.

1. *From Execution.—Statutes Giving, Must be Liberally Construed.*—Statutes providing for the exemption of a reasonable amount of property from seizure or sale for the payment of contract debts must be liberally construed. *Butner v. Bowser, 255*
2. *Same.—Judgments.—Set-Off.*—The holder of a judgment can not set it off against a judgment held by the judgment debtor against him, where the property of the latter, including his judgment, is of a value less than six hundred dollars, all of which he claims as exempt. *Id.*
3. *From Execution.—Refusal to Allow.—Complaint for Damages.—Pleading.*—A complaint to recover damages for the alleged unlawful seizure and sale on execution of property claimed as exempt must state all

the facts necessary to show that the plaintiff had complied with the requirements of section 714, R. S. 1881, providing for inventory and affidavit. *Huseman v. Sims, 317*

EXHIBIT.

See PLEADING, 4, 6, 7; SUPREME COURT, 8.

EXPERT.

See CRIMINAL LAW, 21; EVIDENCE, 9, 13 to 20, 23 to 27.

FELONIES.

See CONSTITUTIONAL LAW; CRIMINAL LAW.

FORECLOSURE.

See COSTS; JUDGMENT, 10; PLEADING, 8; TAXES.

FORFEITURE.

See GRAVEL ROAD, 1 to 5; PRINCIPAL AND AGENT, 10.

FORGERY.

See CRIMINAL LAW, 16 to 20.

FORMER ADJUDICATION.

See HABEAS CORPUS, 3; JUDGMENT, 8, 10; REAL ESTATE, ACTION TO RECOVER, 5.

Judgment on Demurrer.—Where a case is disposed of on judgment upon demurrer to an answer, and not upon its merits, it does not constitute a former adjudication. It is only where the matter in issue has been either actually or presumptively determined, that the judgment is a bar to another action. *Campbell v. Hunt, 210*

FRAUD.

See CONTRACT; EVIDENCE, 1; PRINCIPAL AND AGENT, 5, 6; STATUTE OF FRAUDS.

GRAND JURY.

See CRIMINAL LAW, 35, 36.

GRANTOR AND GRANTEE.

See DEED; MARRIED WOMAN, 3; NOVATION; PRINCIPAL AND AGENT, 3 to 9; REAL ESTATE; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6.

GRAVEL ROAD.

See COUNTY COMMISSIONERS, 9; TAXES, 5.

1. *Act of 1859.—Constitutional Law.*—The act of 1859, entitled "An act to prohibit the collection of tolls on gravel, turnpike, macadamized and plank roads, in certain cases, and to provide the mode of declaring charters of such roads forfeited in certain cases, and repealing all laws inconsistent therewith," Acts 1859, p. 170, embraces but one subject, and is constitutional. *Crawfordsville, etc., T. P. Co. v. Fletcher, 97*
2. *Same.—Amendatory Act of 1875.—Forfeiture of Franchises.—Statute Construed.*—The act of 1859, as amended by the act of 1875, Acts 1875, Reg. Ses., p. 75, confers authority on the courts to enter a judgment of forfeiture of corporate franchises, against a gravel road company, for allowing its road to be and remain out of repair for the space of six months or more. *Ib.*
3. *Same.—Complaint to Forfeit Franchises.—Judicial Knowledge.—Presumption.*—A complaint to forfeit the franchises of a gravel road company must state when or under what law the corporation was organized, as the court can not judicially know, nor can it be presumed, that a private corporation was organized under the general law. *Ib.*

4. *Same.—Consolidation.*—An averment in a complaint in such case, that the corporation was formed of two corporations by consolidation in 1878, and the statement by way of recital, in giving the lines of the road, that one point of the line intersects the corporate boundary of a city "as such corporate limits existed in the year 1860," do not show when the corporations were organized. *Ib.*
5. *Same.—Rights of Consolidated Corporation.*—Under the statute authorizing gravel road corporations to consolidate, sections 3662, 3663, R. S. 1881, the consolidated corporation succeeds to the rights of the constituent corporations. *Ib.*
6. *Collection of Assessment by Sale of Real Estate.*—Under section 5097, R. S. 1881, an assessment for the construction of a gravel road may be collected as other taxes by a sale of real estate by the county treasurer. *Bothwell v. Millikan, 162*
7. *Same.—Lien of Purchaser for Taxes Paid.*—Where the sale does not operate to convey title, the purchaser takes a lien for all taxes paid by him, together with the statutory penalty. *Ib.*
8. *Same.—Tender.—Pleading.*—One seeking relief from a sale of land for taxes, must make a tender of the amount due, and where the amount is capable of computation, the plaintiff must state in his complaint the sum tendered, so the court may determine its sufficiency. *Ib.*
9. *Same.*—An averment in the complaint; that the plaintiff "offered to pay the defendant all money due to him" for the sum paid by the latter on the sale, without stating the amount, is not sufficient. *Ib.*

GUARDIAN AND WARD.

See HABEAS CORPUS, 2; INSANE PERSON.

HABEAS CORPUS.

1. *Petition by Father for Custody of Children.—Welfare of Children Governing Consideration.*—Under section 2518, R. S. 1881, in a *habeas corpus* proceeding by a father for the custody of minor children, the custody should, all else being equal, be awarded to the father; but such section does not overthrow the general rule that, even as between the father and others, the welfare of the children is the governing consideration. *Bryan v. Lyon, 227*
2. *Same.—Rights of Guardian.*—The fact that one has been appointed guardian of minor children, but without the knowledge or consent of their father, is not conclusive against the latter's right to their custody, if he is a suitable person. *Ib.*
3. *Same.—Divorce.—Decree Awarding Custody of Children to Mother is not Perpetual Bar to Father's Rights.*—Upon the death of a mother to whom, in a proceeding for divorce, the custody of the children was awarded, on the ground that the father was not a suitable person to have their care, the latter may, on a satisfactory showing of fitness, secure their custody, as the judgment is not a perpetual bar to such right. *Ib.*
4. *Same.—Sufficiency of Return and Evidence.*—For a return to the writ of *habeas corpus* held sufficient on exceptions, and for evidence considered and held sufficient to justify the trial court in not awarding the custody of children to their father, see opinion. *Ib.*

HARMLESS ERROR.

See PRACTICE, 1, 9, 13, 16; SUPREME COURT, 9, 14.

HEIRS.

See DEED, 2, 3.

HIGHWAY.

See CRIMINAL LAW, 41; GRAVEL ROAD; RAILROAD, 25 to 27.

1. *Appeal from County Commissioners.—Dismissal.*—An appeal to the circuit court will not lie from an order of the county commissioners appointing viewers to report upon the public utility of a proposed highway, and when taken it should be dismissed summarily.
Freshour v. Logansport, etc., T. P. Co., 463
2. *Same.—Jurisdiction.*—A proceeding for the location of a highway remains under the jurisdiction of the county commissioners until by some order or decision it is substantially ended. *Ib.*

HUSBAND AND WIFE.

See DEED, 2, 3; MARRIED WOMAN; PROMISSORY NOTE, 10; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6.

Contract to Repay Money Borrowed from Wife.—Performance.—Equity.—A husband may not only voluntarily perform a contract to repay money borrowed from his wife, but equity will compel performance.
Proctor v. Cole, 373

INDICTMENT.

See CRIMINAL LAW.

INFORMATION.

See CONSTITUTIONAL LAW; CRIMINAL LAW.

INJUNCTION.

See CITY, 1, 4, 5; COUNTY COMMISSIONERS, 8; WATERCOURSE, 4.

INSANE PERSON.

1. *Proceeding to Set Aside Guardianship.—Issue.*—In a proceeding under the statute, R. S. 1881, section 2553, to set aside the guardianship of an insane person, the question to be decided is, whether the person previously adjudged insane has so far regained his reason as to be capable of managing his estate.
Cochran v. Amaden, 282
2. *Same.—When Guardianship Continued.*—If a person under guardianship as an insane person is not so far restored to reason as to be capable of understanding the ordinary affairs of life, the guardianship should be continued. *Ib.*
3. *Same.—Instruction.—Form of Verdict.*—In such case, it is proper to instruct the jury, as to the form of their verdict, that if they find for the plaintiff their finding should be that the person under guardianship is of sound mind and capable of managing his estate, and if against the plaintiff, that such person is of unsound mind and incapable of managing his estate. *Ib.*
4. *Same.—Issues.—Judgment.*—A verdict reading, "We, the jury, find that E. C. is a person of unsound mind and incapable of managing her estate," is responsive to the issues and covers the entire case; and judgment thereon, continuing E. C. under guardianship, is proper. *Ib.*
5. *Same.—Costs Taxed to Plaintiff When Proceeding is Unsuccessful.*—Where a proceeding to set aside the guardianship of an insane person is unsuccessful, the costs should be taxed to the plaintiff, and not to the guardian or estate of the insane person. *Ib.*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 5, 12 to 14, 25 to 31, 33, 42; DAMAGES, 2, 3; INSANE PERSON, 3; NEGLIGENCE, 2; PRACTICE, 17; RAILROAD, 18, 19; SLANDER, 3; SUPREME COURT, 2, 9, 13.

1. *When Court May Direct Verdict.*—When the controlling facts in a case

are admitted or not controverted, it is not error for the court to instruct the jury as to what their verdict should be.

Wabash R. W. Co. v. Williamson, 154

2. *Incomplete Instruction.—Exception to.—How Saved.*—To make an exception to an instruction, which states the law correctly as far as it goes, available for the reversal of a judgment, because of what it omits to state, instructions covering the omitted points must be requested and refused by the court. *Louisville, etc., R. W. Co. v. Grantham*, 353
3. *Same.—How Considered.*—Instructions must be considered with reference to each other and as an entirety; and a judgment will not be reversed simply because one of the instructions, standing alone, may seem to be imperfect or incomplete. *Id.*
4. *Inferences of Fact.*—It is not proper for the court to instruct the jury what inferences of fact they shall draw from the evidence, nor to instruct in detail upon the effect of facts put in evidence.

Louisville, etc., R. W. Co. v. Falvey, 409

INSURANCE.

See CRIMINAL LAW, 10, 12; PRINCIPAL AND AGENT, 9.

1. *Mutual Benefit Society.—Member May Resort to Court of Law to Enforce Rights.*—A member of the Order of Chosen Friends is not bound, as the holder of a relief fund certificate, to exhaust his remedies in the courts of the order before resorting to a court of law, nor is he concluded by an adverse decision on his claim by the Supreme Council, from resorting to a court of law; and the order can not, by provisions in its constitution, by-laws or relief fund laws, deprive him of this right. *Supreme Council, etc., v. Garrigus*, 133
2. *Same.—“Accident.”—Injury Received in Affray.*—Under a provision in the laws of the Order of Chosen Friends providing for payment to certificate holders who have become disabled by accident, the word “accident” will be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation, and it may include an injury received by one in a common law affray, where no fault on his part is shown. *Id.*

INTENT.

See CRIMINAL LAW, 19; PRINCIPAL AND SURETY, 3; REAL ESTATE, 2.

INTEREST.

See DRAINAGE, 1; PRINCIPAL AND AGENT, 11; TAXES, 8.

JUDGE.

See CHANGE OF VENUE; DIVORCE, 3.

JUDGMENT.

See CHANGE OF VENUE, 3; COUNTY COMMISSIONERS, 9; DECEDENTS' ESTATES, 3, 8, 9; DRAINAGE, 13; EXEMPTION, 2; FORMER ADJUDICATION; HABEAS CORPUS, 3; PLEADING, 8; PRACTICE, 1, 3, 7, 8, 13; PRINCIPAL AND AGENT, 4, 13; RECEIVER, 4; SUPREME COURT, 6, 7; SHERIFF'S SALE.

1. *Justice of the Peace.—Contract.—Separate Judgment Against One Sued Jointly with Others.*—Under sections 568 and 569, R. S. 1881, a judgment may, in an action on a contract before a justice of the peace, be rendered against one only of several defendants sued jointly. *Terwilliger v. Murphy*, 32
2. *Clerical Mistake.—Amendment.*—Courts having jurisdiction to render a judgment have inherent power to amend clerical mistakes in a direct proceeding for that purpose, where the rights of third persons have not intervened. *Ryon v. Thomas*, 59

3. *Same.—Equity.—Interlocutory Order.—Proceeding for Amendment.*—An interlocutory order entered in a matter of purely equitable jurisdiction is within the control of the court making it until the proceeding in which it is made is finally disposed of, and it may be amended, modified or set aside, as the right of the case requires, either upon direct and summary proceedings for that purpose, or by the court upon its own motion. *Ib.*
4. *Same.—Practice.*—In such cases the court should hear the application for relief upon its merits, in a summary way, with leave to any party interested to reserve an exception upon any ruling, as in other interlocutory proceedings. *Ib.*
5. *Filing Transcript in Clerk's Office.—Justice of the Peace.—Lien.—Notice.*—As between parties to a judgment before a justice and others with actual notice, a transcript thereof is a lien on the real estate of the defendant in the county from the time of its filing in the clerk's office. *American Ins. Co. v. Gibson, 336*
6. *Review of.—Practice Same as on Appeal.*—The errors that may be made available in an action to review a judgment are the same that may be made available on appeal from the judgment. *Ib.*
7. *Same.—Objections to Judgment Must be Made in Trial Court.—Default.*—If no objection be made to a judgment, and no motion made to modify it in the trial court, no objection can be made available upon appeal, nor in an action to review, however erroneous the judgment may be; and this rule has been applied to cases where judgment was rendered by default. *Ib.*
8. *Contempt.—Estoppel.*—A proceeding against a party for contempt in violating a restraining order does not involve the merits of the legal controversy between the parties, and it is only where the merits are involved that a judgment will operate as an estoppel. *Proctor v. Cole, 373*
9. *Default.—Complaint for Relief Against.—Excuse for Non-Appearance.—Failure to Serve Summons May be Shown Notwithstanding Sheriff's Return.*—In a proceeding under the statute (section 99, 2 R. S. 1876, p. 82; section 396, R. S. 1881) to set aside a default and to be relieved from a judgment, the plaintiff may show, as an excuse for not appearing to the action in which he was defaulted, that the summons was not in fact served upon him, and that he had no notice of the pendency of the action, or of the rendition of the judgment, notwithstanding the fact that the sheriff's return shows service by reading. *Nielert v. Trentman, 390*
10. *Default.—Conclusiveness.—Foreclosure of Mortgage.*—In a suit to foreclose a mortgage, a judgment by default against one who is made a party to answer as to any interest he may have in the mortgaged property, is conclusive as to any prior claim of interest or title adverse to the plaintiff. *Barton v. Anderson, 578*

JUDICIAL KNOWLEDGE.

See GRAVEL ROAD, 3; STATUTE, 3.

JUDICIAL SALE.

See SHERIFF'S SALE.

JURISDICTION.

See CITY, 3; COUNTY COMMISSIONERS, 6 to 9; CRIMINAL LAW, 15; DRAINAGE, 14; HIGHWAY, 2; JUDGMENT, 2, 3.

1. *Courts.—State Comity.*—The courts of this State have jurisdiction to prevent a wrong to a citizen of another State where the wrong consists in doing an act upon land in this State. *Burk v. Simonson, 173*

2. *Plea*.—Where the want of jurisdiction is not apparent, the question must be presented by plea. *Day v. Henry, 324*
3. *Same*.—*Appearance*.—*Waiver*.—*Justice of the Peace*.—By appearing to an action before a justice of the peace, and going to trial without pleading to the jurisdiction of the court, a party waives all questions relating to the service of process or jurisdiction of the justice. *Ib.*

JURY.

See CRIMINAL LAW, 33; DRAINAGE, 7, 12; INSTRUCTIONS TO JURY; PRACTICE, 5, 14; RAILROAD, 19; SALE, 2.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 15, 37 to 40; JUDGMENT, 1, 5; JURISDICTION, 3.

LANDLORD AND TENANT.

Implied Warranty as to Fitness of Premises.—Upon the letting of a house or store-room, there is no implied warranty that it is or shall continue to be fit for the purpose for which it is let. The tenant must determine for himself the safety and fitness of the premises.

Lucas v. Coulter, 81

LARCENY.

See CRIMINAL LAW, 1, 2.

LEASE.

See EVIDENCE, 5; NEW TRIAL; REAL ESTATE, ACTION TO RECOVER, 5.

LEGISLATURE.

See DRAINAGE, 3, 7.

LICENSE.

See COUNTY SUPERINTENDENT.

LIEN.

See BAILMENT; COSTS; GRAVEL ROAD, 7; JUDGMENT, 5; PLEADING, 8; TAXES, 1 to 4, 6, 7, 12.

MAINTENANCE.

See PARENT AND CHILD.

MALICIOUS PROSECUTION.

See PROMISSORY NOTE, 4.

1. *Malice*.—*Probable Cause*.—*Practice*.—In an action for malicious prosecution, the jury may infer malice from the want of probable cause; and where there is evidence from which it could be found that the prosecution was instituted without probable cause, the verdict will not, on the evidence, be disturbed on appeal. *Heap v. Parrish, 36*
2. *Same*.—*Objection to Evidence*.—*Practice*.—Objections to evidence, on the ground of immateriality or irrelevancy, will present no question for decision, where such fact is not apparent on the face of the evidence. *Ib.*
3. *Same*.—*Motive*.—*Evidence*.—It is competent for the defendant in an action for malicious prosecution to testify that he was not actuated by malice, and as to what his motive was in instituting the prosecution complained of. *Ib.*

MALICIOUS TRESPASS.

See CRIMINAL LAW, 4.

MARRIED WOMAN.

See HUSBAND AND WIFE; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6.

1. *Exclusion of Evidence*.—*Pleading*.—Where to a suit on a promissory note,

against a married woman and her husband, she answers her coverture, and that she executed the note as surety for him, it is error to exclude evidence, offered in support of her plea, that she was at the time of executing the note a married woman, and that she signed it as surety for her husband, although the reply alleged that the note was executed in part payment of the purchase-price of land sold and conveyed to her.
West v. Hayes, 30

2. *Same.—Signature to Note.*—A finding in such case against Warren West is sustained by the introduction of a note signed "W. West." *Ib.*
3. *Mortgage.—Estoppel.*—A married woman, who is not bound by a debt nor by the covenants of a mortgage given to secure its payment, is not estopped from claiming title to land conveyed to her in exchange for the mortgaged property, by a *bona fide* purchaser of the latter before the recording of the mortgage. *Reeves v. Howes, 435*

MASTER AND SERVANT.

See PRINCIPAL AND AGENT, 2; RAILROAD, 11, 12.

MEASURE OF DAMAGES.

See DAMAGES; RAILROAD, 19.

MISTAKE.

See JUDGMENT, 2 to 4; RECEIVER, 4; TAXES, 1.

MORTGAGE.

See JUDGMENT, 10; MARRIED WOMAN, 3; NOVATION; PLEADING, 8.

MOTIVE.

See MALICIOUS PROSECUTION, 3.

MUNICIPAL CORPORATION.

See CITY; TOWN.

MURDER.

See CRIMINAL LAW, 6 to 9.

MUTUAL BENEFIT SOCIETY.

See INSURANCE.

NEGLIGENCE.

See DAMAGES; EVIDENCE, 18; PLEADING, 16; PRINCIPAL AND AGENT, 10; RAILROAD.

1. *Sufficiency of Complaint Charging.*—In common law actions based on the negligence of the defendant, it must appear from the complaint, either by direct averment or from the statement of such facts as to a certainty raise the presumption, that the injury was the result of the defendant's negligence. *Pennsylvania Co. v. Marion, 239*
2. *Same.—Negligence Depends on Facts of Case.*—Whether a party was negligent in a particular case depends on the facts in that case, without regard to whether the conduct of the party was that of an ordinarily prudent man. For instructions on this subject see opinion. *Ib.*

NEW TRIAL.

See PRACTICE, 18.

As of Right.—Action to Recover Real Estate.—Leasehold Interest.—A leasehold for a term of years is such a "valid subsisting interest in real property" under section 1050, R. S. 1881, as entitles the lessee, in an action to recover possession, to a new trial as of right under section 1064, R. S. 1881. *Campbell v. Hunt, 210*

NON-RESIDENT.

See COUNTY COMMISSIONERS, 2.

NOTICE.

See APPEAL, 2; COUNTY COMMISSIONERS, 4, 7, 9; DEED, 1; DRAINAGE, 13, 19; JUDGMENT, 5, 9; RAILROAD, 21, 22; REAL ESTATE, 4; SUPREME COURT, 3.

NOVATION.

See PARTNERSHIP.

1. *Elements of.*—Novation is the substitution of one debtor, by mutual agreement, for another, whereby the old debt is extinguished.

Kelso v. Fleming, 130

2. *Same.*—*Assumption of Debt by Purchaser of Real Estate.*—The agreement of a purchaser of real estate to pay a debt evidenced by a promissory note and secured by a mortgage, as a part of the purchase-price, even where the payee subsequently agrees to accept the purchaser as the payor and release the maker, does not constitute a novation. *Id.*

3. *Same.*—*Pleading.*—*Conclusion of Law.*—An averment that the payee did release the maker is the statement of a mere conclusion of law. *Id.*

OFFICE AND OFFICER

See COUNTY SUPERINTENDENT.

OPEN AND CLOSE.

See SLANDER, 4.

OPINION.

See EVIDENCE, 9, 15, 27, 30; WITNESS.

PARENT AND CHILD.

See HABEAS CORPUS; PROMISSORY NOTE, 10.

Promissory Note.—*Assignment.*—*Consideration.*—A son may lawfully assist his father in conducting a litigation with his money, time and services, and a debt so incurred by the father will constitute a valid consideration as against his creditors for the transfer of a promissory note to the son.

Proctor v. Cole, 373

PARTIES.

See PLEADING, 5, 9; REAL ESTATE, 5; SUPREME COURT, 7.

PARTITION.

See QUIETING TITLE, 2.

PARTNERSHIP.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; EVIDENCE, 5; RECEIVER, 3.

Liability of New Partner on Contract Previously Made by Other Partner.—*Ratification.*—*Novation.*—One who, after becoming a member of a firm, upon a sufficient consideration, expressly or by implication, adopts, while it is executory, a contract previously made by the other partner, and such contract is treated by both contracting parties as one made with the firm, the new partner will be liable the same as if it had been made with the firm in the first instance.

Lucas v. Coulter, 81

PAYMENT.

See PLEADING, 13 to 15; PROMISSORY NOTE, 1 to 3; SALE; SUBROGATION.

PERJURY.

See SLANDER, 1 to 3.

PERSONAL PROPERTY.

See BAILMENT; TAXES, 9 to 11.

Purchase-Money.—Presumption.—Delivery.—In the absence of any showing to the contrary, the presumption is that the purchase-money for personal property becomes due and payable when such property is delivered to the purchaser. *Tervilliger v. Murphy, 32*

PLEADING.

See CITY, 5; COSTS; COUNTY COMMISSIONERS, 1; CRIMINAL LAW; DECEDENTS' ESTATES, 4 to 7; DIVORCE; DRAINAGE; EVIDENCE, 4, 10, 11; EXEMPTION, 3; GRAVEL ROAD, 3, 4, 8, 9; JURISDICTION, 2, 3; MARRIED WOMAN, 1; NEGLIGENCE; NOVATION, 3; PRACTICE; PROMISSORY NOTE, 4, 6; QUIETING TITLE; RAILROAD, 3, 6, 8, 9, 14, 24, 25; RECEIVER, 1, 2; SLANDER, 1, 4; STATUTE, 3; SUPREME COURT, 1, 4, 5, 8; TENDER.

1. *Theory of Complaint.*—A complaint must proceed upon a distinct and definite theory, and upon that theory the case must stand or fall. *Chicago, etc., R. R. Co. v. Bills, 13*
2. *Practice.—Amendment of Complaint.—Statute of Limitations.*—An amendment to a complaint has relation to the time at which the complaint was filed. It is only where the amendment sets up some claim or title, not previously asserted, and involving the statute of limitations, that a different rule applies. *School Town of Monticello v. Grant, 168*
3. *Same.—School Corporation.*—Where it is apparent that a town was sued as a school corporation, but it is not specifically described as such in the complaint, the filing of an amended complaint so describing it relates back to the time of filing the original complaint. *Ib.*
4. A failure to aver that a promissory note which is sued on is due may be cured by exhibit filed with complaint. *West v. Hayes, 251*
5. *Complaint.—Cause of Action.—Demurrer.*—Where the face of a complaint shows a cause of action in a third person, and not in the plaintiff, it is bad on demurrer for want of facts. *Sinker v. Floyd, 291*
6. *Written Instrument.—Exhibit.—Practice.*—Under section 362, R. S. 1881, it is only where the complaint is founded on a written instrument that the filing of a copy as an exhibit makes it a part of the record. *Huseman v. Sims, 317*
7. *Same.—Improper Exhibit will not Aid Complaint.*—Where a writing which is not the foundation of the action is filed with the complaint as an exhibit, it can not be looked to to supply an omitted averment, or to otherwise aid the complaint. *Ib.*
8. *Complaint.—Transcript of Judgment.—Lien on Real Estate.—Foreclosure of Lien.—Defence or Disclaimer.*—A complaint, averring that the plaintiffs became the owners of certain real estate through the foreclosure of a mortgage executed in 1874, and the purchase of the same by the plaintiffs' ancestor on the sale under the decree in 1879; that in 1877 the defendant filed a transcript of a judgment against the mortgagor in the office of the clerk of the circuit court of the proper county, and the same became a junior lien upon the real estate covered by the mortgage, and praying that said judgment lien be foreclosed and forever barred, etc., sufficiently shows that the defendant was asserting such a lien or claim against the land as called for a defence or disclaimer. *American Ins. Co. v. Gibson, 336*
9. *Practice.—Defect of Parties.—Demurrer.—Answer.*—A complaint which does not show upon its face that there is a defect of parties is not bad on demurrer for that cause, and if such defect exists it should be shown by answer. *Ib.*
10. *Complaint Good as to Part of Relief Asked.—Demurrer.*—A complaint

- which is sufficient as to part of the relief asked will repel a demurrer although insufficient as to other relief. *Culbertson v. Munson*, 451
11. *Practice.—Recovery Secundum Allegata et Probata.*—A plaintiff must recover on the theory on which his complaint proceeds or not at all. *Louisville, etc., R. W. Co. v. Godman*, 490
 12. *Same.—“To Maintain,” Signification of.*—The verb “to maintain,” in pleading, signifies to support what has already been brought into existence. *Ib.*
 13. *Payment.*—An answer alleging payment in full of the claim sued on is good on demurrer, although pleaded with other matter which is improper. *Johnson v. Breedlove*, 521
 14. *Same.—Sufficiency of Plea of Payment.*—In a plea of payment, it is sufficient to allege payment generally, without stating the amount paid, the date of payment or the person to whom made. *Ib.*
 15. *Same.—Payment by Administrator.—Application of Money.—Principal and Surety.*—An answer by one claiming to be surety only, that the plaintiff had been fully paid by money received from the estate of the principal debtor, and with the administrator's consent, sufficiently shows that the administrator agreed that the money so received should be so applied. *Ib.*
 16. *Complaint Charging Negligence.—Motion to Make More Specific.—Practice.*—An objection that the averments of a complaint charging negligence are not sufficiently specific, must be taken by a motion to make more specific. It is not a cause for demurrer. *Cincinnati, etc., R. W. Co. v. Gaines*, 526
 17. *Answer.—Cross Complaint.*—A single pleading can not perform the two-fold function of an answer in bar and a cross complaint. *Conger v. Miller*, 532
 18. *Same.*—A cross complaint, like a complaint, must be good within and of itself, without aid from other pleadings in the cause. *Ib.*

POOR.

See COUNTY COMMISSIONERS, 2, 3; TOWNSHIP TRUSTEE, 3, 4.

PRACTICE.

See APPEAL; BILL OF EXCEPTIONS; CHANGE OF VENUE; COSTS; COUNTY COMMISSIONERS, 1; COUNTY SUPERINTENDENT, 5, 6; CRIMINAL LAW; DECEDENTS' ESTATES; DEMURRER TO EVIDENCE; DIVORCE; DRAINAGE; EVIDENCE, 3, 4, 10, 11, 13 to 17, 19 to 22, 25, 30; HIGHWAY; INSTRUCTIONS TO JURY; JUDGMENT, 1 to 7; JURISDICTION, 2, 3; MALICIOUS PROSECUTION; PLEADING; PROMISSORY NOTE, 6; RECEIVER, 1; SALE, 2; SPECIAL FINDING; SUPREME COURT.

1. *Harmless Error.*—Where the ultimate judgment is one of which the appellant can not complain, intermediate errors are harmless. *Bothwell v. Millikan*, 162
2. *When Error in Excluding Evidence Cured by Withdrawing Objection to Admission.*—Where evidence is excluded on objection, but immediately thereafter the objection is withdrawn to the only part of it which is material, the error, if any, is cured, although the party offering the evidence declines to avail himself of the concession. *Campbell v. Hunt*, 210
3. *Judgment Non Obstante Verdicto.*—Under the civil code of this State, a motion for judgment *non obstante verdicto*, or for judgment on the pleadings, can only be made by the party against whom the verdict has been found. Section 566, R. S. 1881. *Brown v. Searle*, 218
4. *Same.—Special Finding.—General Verdict.*—If the special findings are not inconsistent with the general verdict, the latter will stand. *Ib.*

5. *Impeachment of Witness.—Corroboration.*—It is for the jury to determine whether the evidence in corroboration of a witness should outweigh the impeaching evidence. *Pennsylvania Co. v. Marion, 239*
6. *Demurrer to Paragraphs of Answer Jointly.*—A demurrer to several paragraphs of answer jointly will be properly overruled if one paragraph is good. *State, ex rel., v. Fawcote, 287*
7. *Judgment non Obstante Verdicto.*—Judgment can not be rendered *non obstante* on answers to interrogatories returned by the jury with their general verdict, unless the former are inconsistent with the verdict. *Day v. Henry, 324*
8. *Judgment on Bad Pleading.*—Where the record affirmatively shows that the judgment rests upon two pleadings, one of which is bad, it will be reversed for a new trial. *Walker v. Heller, 327*
9. *Evidence.—Motion to Strike Out Testimony.*—Where a motion to strike out testimony is made, and the adverse party consents that it be sustained, after which the motion is withdrawn, but the court, upon the request of such adverse party, strikes out all the testimony objected to by the motion, the party making the motion can not complain of the action of the court, and the original admission of the testimony is not available error. *Louisville, etc., R. W. Co. v. Falvey, 409*
10. *Same.*—General objections to testimony, on the ground that the same is incompetent and immaterial, present no available questions entitled to consideration on appeal. *Ib.*
11. *Pleading.*—Where the complaint is bad, the overruling of a demurrer to an insufficient answer is not available error. *Reeves v. Howes, 435*
12. *Dismissal of Appeal.—Bill of Exceptions.*—It is only where a motion to dismiss an appeal rests upon matters not apparent on the face of the record itself that a bill of exceptions is necessary to present it. *Freshour v. Logansport, etc., T. P. Co., 463*
13. *Pleading.—Harmless Error.*—Where it affirmatively appears on the face of the record that the judgment rests on a good paragraph of a pleading, an error in overruling a demurrer to a bad paragraph is harmless. *Tracewell v. Farnsley, 497*
14. *Jury may Take Pleadings to Jury-Room.*—It is not error to permit the jury to take with them to the jury-room the pleadings in the cause. *Shulze v. McWilliams, 512*
15. *Venire de Novo.*—Where the answer of one of several defendants tenders an issue which, if found in his favor, is conclusive against the plaintiff as to all, and a general verdict for such defendant alone is returned, a *venire de novo* will not be granted, notwithstanding there are issues with the other defendants upon which no finding is made. *Johnson v. Breedlove, 521*
16. *Same.—Harmless Error.*—An "answer" to a motion for a *venire de novo* is unknown to the practice, and when made should be stricken out, but a failure to strike it out is not available to reverse the judgment where no harm resulted. *Ib.*
17. *Instructions to Jury.—Not Error to Read Complaint to Jury.*—The trial court may, without error, read the complaint in the action to the jury in the course of its instructions. *Clouser v. Ruckman, 583*
18. *Same.—Bill of Exceptions.—Motion for New Trial.—Practice.*—Recitals in a motion for a new trial, or of the clerk, can not perform the office of any statement required to be incorporated in a bill of exceptions. *Ib.*

PRESUMPTION.

See COMMON LAW; COUNTY SUPERINTENDENT, 5; CRIMINAL LAW, 39; GRAVEL ROAD, 3; NEGLIGENCE, 1; PERSONAL PROPERTY; RAIL-

ROAD, 9, 17; REAL ESTATE, 7; SPECIAL FINDING, 1, 2; SUPREME COURT, 2, 4; WATERCOURSE, 1, 2

PRINCIPAL AND AGENT.

See RAILROAD, 21, 22.

1. *One Acting as Agent without Authority is Liable as Principal.*—Where one person assumes to act as the agent of another, but without authority to do so, he makes himself personally liable as a principal in the transaction.
Terwilliger v. Murphy, 32
2. *Book-keeper.—Trust.—Embezzlement.*—A book-keeper or salesman, who receives the money of his employer by virtue of his employment, receives it in a fiduciary capacity, and if he fraudulently appropriates it to his own use, he is guilty of a breach of trust.
Riehl v. Evansville Foundry Ass'n, 70
3. *Same.—Property Purchased with Embezzled Money.—Equity.*—Where an agent, in violation of his trust, uses the money of his principal in the purchase of property, the law implies a trust in favor of the principal, and equity will subject such property to the latter's claim as against either a volunteer or a fraudulent grantee.
Ib.
4. *Same.—Judgment for Amount Due in Excess of Value of Property.*—The beneficiary can not follow the trust into the property purchased by the agent, and also compel payment of the money from the latter; but he may obtain a judgment for the sum remaining due after deducting the value of the property, and in one action secure both equitable and legal relief.
Ib.
5. *Purchase by Confidential Agent of Principal's Property.*—Where one, while occupying the relation of general confidential business agent of another, is requested by the latter to find a purchaser at a fixed price for certain land, but being unable to do so proposes to buy the property himself at that price, at the same time communicating to his principal all the facts within his knowledge about the land and its value, misrepresenting or concealing nothing, and a sale is accordingly made to him, the price paid being at the time a fair one, such sale is valid.
Rochester v. Levering, 562
6. *Same.—Burden on Agent to Show that Sale was Fair.*—When the sale is seasonably attacked, the burden is on the agent to show that the bargain was fair and equitable, that he gave all the advice in his knowledge pertaining to the matter, and that there was no suppression or concealment which might have influenced the conduct of the principal.
Ib.
7. *Same.—Agreement to Lay Out into Lots.—Payment from Proceeds.*—A writing, executed by the agent as evidence of his obligation for the purchase-price, stipulating that he is to lay the land out into town lots, but specifying no time, and to pay the agreed price, with a certain rate of interest, out of the proceeds of the sales of said lots, in money or promissory notes taken, is not so contingent or unfair as to invalidate the sale.
Ib.
8. *Same.—Subsequent Transactions.*—The sale of the land can not be affected by independent dealings which were had afterwards, and which had no relation to the principal transaction.
Ib.
9. *Same.—Insurance of Principal's Property in Company Represented by Agent.*—Where the general business agent of another is also the agent of an insurance company, and in the latter capacity writes insurance upon the property of his principal, but with such knowledge on the part of the company as would make the policies valid, or at most merely voidable, he is entitled to be reimbursed for the premiums paid by him.
Ib.

10. *Same.—Forfeiture of Compensation for Services.*—Mere errors of judgment on the part of an agent while managing his principal's business, or omissions which do not amount to misconduct or culpable negligence, do not work a forfeiture of the agent's right to compensation for services. *Ib.*
11. *Same.—Interest.*—Where, in order to meet the calls, in uncertain amounts, of his principal upon him, it is necessary that an agent—who, as it is received, mixes his principal's money with his own and uses it in his business—shall keep money available, he is not chargeable with the highest obtainable rate of interest on the sums remaining in his hands, but legal interest only. *Ib.*
12. *Same.—Agent's Liability for Loss.*—An agent who, by neglect and want of diligence, fails to collect money of his principal loaned by him, is liable for the loss. *Ib.*
13. *Same.—Judgment Without Relief.—Trust Funds.*—Under section 577, R. S. 1881, a judgment without relief against an agent, in favor of his principal, for money for which he is liable as a trust fund, is proper. *Ib.*

PRINCIPAL AND SURETY.

See MARRIED WOMAN, 1; PLEADING, 15.

1. *Liability of Surety.*—A surety will not be held beyond the terms of his engagement, but the latter must be reasonably interpreted. *Irwin v. Kilburn, 113*
2. *Same.—Contract.—Bond for Performance of.*—Sureties in a bond given to secure the performance of a contract are presumed to have contracted with knowledge of and reference to the terms of such contract, and they are bound by it if valid. *Ib.*
3. *Contract.—Construction of.—Intention of Parties.*—Courts will give a written contract such a reasonable construction as will make it effective according to the intention of the parties, and for this purpose it must be considered as a whole. *Ib.*
4. *Same.—Uncertainty.—Surplusage.—Sureties for Performance.*—A contract to do, according to specifications, all of certain kinds of work on the line of a railroad, "in the county of ———, State of Indiana," and "that the work embraced in this contract shall be prosecuted with such force and at such places" as the other party may direct, is not, taken as a whole, void for uncertainty in not naming the county, as the words "county of ———," may be rejected as surplusage, and the contract given effect and made binding on sureties for performance. *Ib.*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See CHANGE OF VENUE, 2, 4.

PROCESS.

See COUNTY COMMISSIONERS, 4; JUDGMENT, 9; JURISDICTION, 3.

PROMISSORY NOTE.

See ATTORNEY AND CLIENT; EVIDENCE, 12; MARRIED WOMAN, 1, 2; NOVATION; PARENT AND CHILD; PLEADING, 4; SUPREME COURT, 8; TENDER.

1. *Payment.—Question of Fact.*—Whether a transaction between the holder of a promissory note and the person who pays the money therefor is of such a character as to constitute a payment that will operate to extinguish the debt, is generally a question of fact. *Binford v. Adams, 41*
2. *Same.—Transfer of Note.—Contract.*—Payment is the discharge of a

debt, and is not a contract. The purchase of a note is a contract of sale requiring the mutual assent, either express or implied, of a buyer and seller, and a consideration. *Ib.*

3. *Same.—Agreement with Maker.*—Where a third person, at the request of the maker, pays to the holder of a promissory note the amount due thereon, and receives the note, his agreement with the maker can not be considered in determining whether the note was purchased or paid off. *Ib.*
4. *Pleading Unliquidated Damages in Set-Off.—Malicious Prosecution of Civil Action.*—To a complaint on a promissory note an answer that the plaintiff had maliciously and without cause procured the prosecution of a civil action against the defendant which was still pending, and that he had been and would be put to great cost and expense in defending such action, whereby the note in suit had been fully satisfied, is bad. *West v. Hayes, 251*
5. *Negotiability.—Commercial Paper.—Time of Payment.—Provision in Note for Extension.*—A note, although payable in a bank in this State twelve months after date, is not negotiable as an inland bill of exchange when it contains a provision that "the payee or his assigns may extend the time of payment from time to time indefinitely, as he or they may see fit," as the time of payment is not certain and unconditional; and in an action on such note defences may be made as in actions on other non-negotiable paper. *Glidden v. Henry, 273*
6. *Same.—Plea in Abatement.—Practice.*—The defence of an extension of time of payment of a promissory note should be made as a plea in abatement, and under the statute (section 365, R. S. 1881,) it can not be pleaded with, but must precede, an answer in bar. *Ib.*
7. *Bona Fide Holder.—Nominal Consideration.*—The mere nominal consideration of one dollar is not sufficient to constitute a person a *bona fide* holder of a note. *Proctor v. Cole, 373*
8. *Same.—Equitable Assignment.*—As against one who has a prior equitable assignment, a party who has paid merely a nominal sum for a promissory note, and agreed to pay a sum equal to the half of the proceeds that he may realize from it, is not a good faith holder of the note. *Ib.*
9. *Same.—Set-Off.—Mutuality.*—Mutuality is essential to the validity of a set-off, and the claim asserted as a set-off must be held by the party who pleads it, and not by him and another jointly. *Ib.*
10. *Same.—Equitable Consideration.—Husband and Wife.—Parent and Child.*—The promise of a husband, who has borrowed money from his wife, to pay it to her children, is an equitable consideration which will support the assignment of a promissory note from the husband to one of such children. *Ib.*

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 32.

QUIETING TITLE.

See COSTS; TAXES, 12.

1. *Cross Complaint.—Sufficiency of.*—A cross complaint to quiet title which does not so describe the real estate that it can be ascertained, except by reference to the other pleadings in the case, and does not aver that the opposite party claims any adverse interest, nor that his claim is unfounded or a cloud upon the cross complainant's title, is bad on demurrer. *Conger v. Miller, 592*
2. *Same.—Partition.—Quere,* whether a cross complaint to quiet title to real estate is a proper pleading in an action merely for partition. *Ib.*

QUITCLAIM.

See DEED, 1.

RAILROAD.

DAMAGES; EVIDENCE, 18; NEGLIGENCE.

1. *Ejecting Passenger from Train.—Liability of Company.*—A railroad company is liable to one who has been ejected with unnecessary force from a train by the conductor, although the latter had a right to expel such person and to use reasonable force for such purpose.
Chicago, etc., R. R. Co. v. Bills, 13
2. *Same.—Degree of Force.*—The degree of force is not to be determined by results only, but other facts, such as the resistance made by the passenger, must be taken into consideration. *Ib.*
3. *Same.—Complaint.*—Where a complaint proceeds upon the theory that unnecessary force was used in ejecting the plaintiff, it must state such facts as show that the act of the conductor was unlawful, i. e., by alleging facts showing that the force employed was unnecessary. *Ib.*
4. *Same.—Wrongful Expulsion.*—An action may be maintained against a railroad company by one who has been wrongfully ejected from a train, without regard to the degree of force used in the expulsion. *Ib.*
5. *Same.—Stopping at Stations.—Rules of Company.—Rights of Passengers.*—A passenger has no right on a train which, under the rules of the company, does not stop at the station for which he purchased a ticket. *Ib.*
6. *Same.—Complaint.*—A complaint by a ticket-holder for wrongful expulsion must aver that, under the rules of the company, the train on which he took passage should stop at the station named on his ticket. *Ib.*
7. *Negligence.—Action for Injury.—Proximate Cause.*—In an action against a railroad company to recover damages for injuries caused by its alleged negligence, the complaint must not only charge the defendant with the negligent acts, whether of commission or omission, but also show with reasonable certainty that such acts were the direct or proximate cause of the accident or injury.
Pittsburgh, etc., R. W. Co. v. Conn, 64
8. *Same.—Allegation of Negligence.*—In such case, the allegation in the complaint, that the defendant, with gross negligence and in a careless and reckless manner, caused one of its locomotives, then and there operated by its servants and agents, to rapidly approach the street crossing where the accident occurred, without having the headlight lit in said locomotive, and without giving any reasonable, timely or proper warning, notice or signal of its approach, either by ringing the bell or blowing the whistle at a safe and reasonable distance from said crossing, fails to show that the accident or injury was caused by the negligence of the defendant. *Ib.*
9. *Same.—Contributory Negligence.—Presumption.*—Where, from the specific facts alleged in a complaint, it might well be presumed that the plaintiff was guilty of contributory negligence, yet such presumption is one of fact, and will not be allowed to overcome or outweigh the positive averment of plaintiff to the contrary. *Ib.*
10. *Duty of Company as to Safety of Employees.*—It is the duty of a railroad company to so construct and maintain its roadway and appendages, and its overhead structures, that its employees can perform the labor required of them with reasonable safety.
Baltimore, etc., R. R. Co. v. Rowan, 88
11. *Same.—Low Bridge.—Liability for Injury to Employee Caused by.*—Where a railroad company has constructed and maintains a bridge over its

- track with knowledge that it is of insufficient height and dangerous to its employees in the discharge of their duties, it is liable to a brakeman, ignorant of the danger, who is injured while passing under such bridge in the performance of his duties. *Ib.*
12. *Liability to Third Persons for Stock Killed at Private Crossings.*—Where, for the convenience of a farmer whose lands lie on both sides of a railroad, gates are put in the fence on each side of the track for a private crossing, he assumes the risk of all increased danger resulting therefrom, and as to him the track will be considered as having been securely fenced as the statute (section 4031, R. S. 1881) requires; but as to all other persons the railroad company is bound, at its peril, to keep the gates closed. *Wabash R. W. Co. v. Williamson, 154*
13. *Same.—Cattle-Pits.*—*Quere*, whether a railroad company can relieve itself from liability to all persons for killing stock at a strictly private crossing by putting in cattle-pits and other safeguards, either instead of or in addition to gates in its fences? *Ib.*
14. *Negligence.—Stepping from Moving Train.—Defective Depot Platform.*—A complaint against a railroad company by a passenger who was injured in stepping from a slowly moving train upon the platform of a regular station, alleging that the platform "had been suffered to get out of repair and wholly unsuitable for the reception of passengers," and that it had settled down in the center, forming an incline which caused the plaintiff to slip and fall under the train, of which defect the plaintiff had no knowledge, is not sufficient. *Pennsylvania Co. v. Marion, 239*
15. *Same.—Degree of Care as to Platforms and Approaches.*—With respect to its platforms and approaches, a railroad company is only held to that reasonable degree of care which is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business. *Ib.*
16. *Same.—Evidence as to Condition of Platform After Injury.*—Evidence as to the condition of the platform some time after the injury is not admissible, unless it be shown that its condition is substantially the same as at the time of the injury. *Ib.*
17. *Negligence.—Broken Rail.—Presumption.—Burden of Proof.*—Where a car, by the breaking of a rail, is thrown from the track, resulting in injury to a passenger, a presumption of negligence arises against the railroad company, which it must rebut by clear and explicit proof that the accident could not have been avoided by the utmost skill and care, and as to showing the facts essential to negative such presumption the burden is on the company. *Cleveland, etc., R. R. Co. v. Newell, 264*
18. *Same.—Breaking of Successive Rails at Same Place.—Instruction to Jury.*—In an action against a railroad company to recover damages for an injury caused by an accident resulting from a broken rail, an instruction to the jury, that if they find from the evidence that such rail had been put down in place of another which had broken the same morning at the same place, they might consider this fact in determining whether the rail which caused the accident was a good one, and whether it was properly and carefully put down, is proper. *Ib.*
19. *Same.—Instruction as to Measure of Damages.—Province of Jury.*—In an action for personal injury, an instruction to the jury that in estimating damages they may consider past and future suffering, the value of time lost, or likely to be lost, whether the injury is likely to be permanent or not, and its probable effect upon the future health of the party, and upon all the facts ascertain the extent of the injury and award such damages as in their judgment "will compensate, so far

as money can," for such injury, is not erroneous as invading the province of the jury. *Ib.*

20. *Common Carrier.—Liability for Baggage.—Rules of Company.*—A rule by a railway company, that a person, intending to become a passenger, shall purchase a ticket or pay fare before the company receives and becomes responsible for his baggage, is a reasonable regulation, but if no such rule is adopted, or, being adopted, is not observed by its agents, or if, notwithstanding such rule, a trunk is received as baggage, trusting to the honesty of the owner to purchase a ticket or passage upon the train upon which the trunk is to go, such company will be liable for its loss to an owner who has acted in good faith, whether such loss occurred before or after the arrival and departure of the train, or before or after the purchase of a ticket or the payment of fare. *Lake Shore, etc., R. W. Co. v. Foster, 293*
21. *Same.—Agent.—Notice to Third Person.*—Where a baggageman is the agent of a railway company, with general authority to receive the baggage of persons intending to go upon the company's train, and does receive baggage in violation of the rules and regulations of the company, the latter will be liable for the loss of such baggage to the owner who has delivered the same in good faith within a reasonable time before the departure of the train, unless the existence of such rules is brought to the knowledge of such owner. *Ib.*
22. *Same.—Restrictions upon Agent's Authority.*—Restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them on inquiry as to the extent of his actual authority. *Ib.*
23. *Common Carrier.—Refusal to Receive and Carry Cattle.—Delivery for Transportation.*—Where cattle intended for shipment are placed in a railroad company's stock-pens at a station on its road, the refusal of such company afterwards to receive and carry such cattle, excuses any further delivery, or offer to deliver, for transportation, on the part of the shipper. *Louisville, etc., R. W. Co. v. Godman, 490*
24. *Same.—Defective Stock-Pens and Loading Facilities.—Delay of Train Beyond Regular Time to Receive Freight.—Evidence.*—Evidence showing no wrong on the part of the railroad company except a failure to construct and keep in repair a proper fence around its stock-pens, and a failure to keep the chute in proper repair, whereby cattle intended for shipment escape from such pens, and their loading on the car was delayed until the train which was to carry them had left the station, will not support a recovery based on a complaint asking damages for a refusal to receive and carry such cattle; nor can a refusal to receive and carry be predicated upon the fact that the train was not held beyond its regular time until the cattle could be loaded. The ways and means for loading being in proper condition, and the duty of loading being upon the shipper, it is his duty to have the car loaded so that the train which is to move it may not be unreasonably delayed. *Ib.*
25. *Action for Personal Injury.—Negligence.—Contributory Negligence.—Pleading.*—A complaint against a railroad company, alleging that the defendant's train approached a highway crossing without giving the required statutory signals and without the plaintiff's knowledge, whereby his team was frightened and ran away, and the plaintiff, without any fault on his part, was injured, sufficiently rebuts any presumption of contributory negligence. *Cincinnati, etc., R. W. Co. v. Gaines, 526*
26. *Same.—Highway Crossing.—Sounding Whistle.—Injury by Frightened Team.*—Where a railroad track crosses a highway by an overhead bridge

and the plaintiff's team passing beneath, without the knowledge of those in charge of the train passing above, is frightened by the sounding of the whistle and runs away, whereby the plaintiff is injured, the company, in the absence of any showing that the whistling was unnecessary, is not liable, although the crossing was known to be one of extraordinary danger. *Ib.*

27. *Same.—Sounding Whistle at Place of Extraordinary Danger not Negligence Per Se.—Burden of Proof.*—The mere sounding of a locomotive whistle, even at a place of extraordinary danger, where teams are likely to be frightened thereby, is not of itself negligence, and to justify an inference of negligence from such act the party having the burden of the issue must show that it was done under such circumstances as made it at that time negligent. *Ib.*

RAPE.

See CRIMINAL LAW, 25 to 31.

RATIFICATION.

See PARTNERSHIP.

REAL ESTATE.

See DEED; EVIDENCE, 5, 31; GRAVEL ROAD, 6 to 9; JUDGMENT, 10; LANDLORD AND TENANT; MARRIED WOMAN, 3; NOVATION; PLEADING, 8; PRINCIPAL AND AGENT, 3 to 9; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; TAXES; WATER-COURSE.

1. *Description.*—In descriptions of real estate, monuments first control, then courses and distances, and lastly the designated quantity.

Allen v. Kersey, 1

2. *Same.—Deed.—Intention of Parties.*—When there is a contest between the parties as to what has passed by a deed, the circumstances under which it was executed, and the intention of the parties, ought to be considered. *Ib.*

3. *Same.—Covenants of Title.—Limitation of.*—Covenants of title must be limited to the estate, as well as to the particular parcel of ground, intended to be conveyed, as evinced by the description in the deed, when applied to the property as it was situated at the time of the conveyance. *Ib.*

4. *Same.—Seizin.—Breach of Warranty.*—K., while the owner of a lot, built two houses thereon, one of which was intentionally lapped over twenty inches upon the north half of said lot. He subsequently conveyed the whole lot to A. Afterwards A., believing that all the south house was situate upon the south half, conveyed said south half to C. and the north half back to K. By proceedings for that purpose against K. and A., C.'s deed was reformed so as to make it convey all the ground, including the twenty inches, upon which the south house stood. K. sued A. on his covenants of warranty to recover damages. *Held*, that K., having knowledge of all the facts at the time of taking his deed, and that C. was in possession of the south house and the ground upon which it stood, under claim of title, can not recover. *Ib.*

5. *Action for Breach of Covenants in Deed.—Real Party in Interest.*—An action for a breach of covenants contained in a deed must be brought by the real party in interest, viz., the person entitled to the money recovered as damages. *Sinker v. Floyd, 291*

6. *Grantor and Grantee.*—A party who has conveyed land can not do any act that will impair or invalidate the rights of his grantees.

City of Delphi v. Startzman, 343

7. *Deed.—Trust and Trustee.—Special Finding.—Presumption.*—A special

finding, that the land in controversy was conveyed to the cashier of a bank personally, by an absolute deed of general warranty; that in the transaction a promissory note held by the bank against the grantor was paid off and surrendered; that such conveyance was fully known to the other officers of the bank at the time; that neither the bank, during its existence, nor its officers or stockholders, asserted any claim to, or interest in, such land for more than twenty-five years, nor until after the commencement of this suit; that though such grantee ceased to be cashier of the bank shortly after such conveyance, "there was no such account as a real estate account in the books of the bank," and that the plaintiffs, who were the heirs of the grantee, knew nothing of such conveyance until 1881, fails to show that the grantee took or held the land in trust for the bank, and, in the absence of any fact to the contrary, the presumption is that he paid for the land with his own personal means.

Hedges v. Keller, 479

REAL ESTATE, ACTION TO RECOVER.

See EVIDENCE, 5; NEW TRIAL.

1. *Statute of Limitations.—When Begins to Run.*—The statute of limitations begins to run only when the right of action accrues; and in the case of a claim to the possession of real estate, the right of action does not accrue until there is a right of entry.
Wright v. Tichenor, 185
2. *Same.—Sale on Execution against Husband Alone.—Wife's Interest.*—Where land was sold in 1854 upon an execution against the husband alone, the right of the wife to enter into possession of the land did not vest until the death of her husband, and an action may be brought within twenty years from that time.
Id.
3. *Same.—Interest Taken by Purchaser.*—A sale made upon a judgment rendered against the husband alone does not convey the interest of the wife, but only that of the husband.
Id.
4. *Same.—Unrecorded Deed.*—In such case the fact that the husband's deed to the land was unrecorded can not deprive the wife of her rights as against a person claiming title under such sale.
Id.
5. *Action upon Claim in Fee Simple not Bar to Action under Lease.*—The commencement of an action upon a claim of title in fee simple does not estop the plaintiff from subsequently bringing an action for the same land on a claim under a lease.
Campbell v. Hunt, 210
6. *Sale on Judgment against Husband Alone.—Separate Deed of Wife to Purchaser.—Color of Title.—Statute of Limitations.—Disability of Coverture.*—In 1854 certain land belonging to C. was levied upon and sold to satisfy a judgment against him alone. In 1856, his wife executed a deed, in which he did not join, to one claiming under the sheriff's sale. In 1864, C. died, his wife surviving. Action by the latter, in 1884, against a remote grantee to recover one-third of the land.
Held, that while her deed was void, it was sufficient to convey color of title.
Held, also, that the plaintiff's cause of action to avoid the deed which gave color of title accrued when her grantee took possession under the deed in 1856, as there was then an adverse possession of all the land.
Held, also, that the defendant and his grantors having been in possession more than twenty years under color of title conferred by the plaintiff's deed, the action is barred by the statute of limitations, the plaintiff's disability of coverture not postponing the time when the statute began to run.
Wright v. Kleyla, 223

RECEIVER.

1. *Pleading.—Practice.*—Ordinarily, the sufficiency of a complaint, in an

action in which a receiver is applied for, can not be tested by demurrer, or otherwise, at the time of the application. *Bufkin v. Boyce*, 53

2. *Same.—Appointment.—Purpose of Action.*—The appointment of a receiver may be part of the relief asked in a complaint in actions of the class in which receivers may be appointed, but it is doubtful whether this can be the sole purpose of an action. *Ib.*
3. *Same.—Partnership.—When Receiver will not be Appointed.*—Where a partnership has expired by limitation, and neither partner desires to continue the business, a receiver will not, on the application of one, be appointed to settle the partnership affairs, in the absence of any showing of mismanagement or improper conduct on the part of the person against whom the relief is sought. *Ib.*
4. *Interlocutory Order.—Mistake.—Amendment.*—Where a receiver, previous to a final settlement, is by a mistake ordered to pay out more money than had or would come into his hands as such receiver, he is entitled to have the order modified. *Ryon v. Thomas*, 59

REDEMPTION.

See TAXES, 2 to 4, 9.

RENTS.

See EVIDENCE, 5.

REPEAL OF STATUTE.

See COUNTY COMMISSIONERS, 5; DRAINAGE, 4; TAXES, 9.

REPLEVIN.

See ANIMALS, 2; BAILMENT.

RES ADJUDICATA.

See DECEDENTS' ESTATES, 8, 9; DRAINAGE, 14; FORMER ADJUDICATION; HABEAS CORPUS, 3; JUDGMENT, 8, 10.

REVIEW OF JUDGMENT.

See JUDGMENT, 6 to 8.

RIGHT OF WAY.

See WATERCOURSE, 2.

RIGHTS AND REMEDIES.

See CITY, 1, 4; INSURANCE, 1; STATUTE, 1, 3.

RIPARIAN OWNER.

See WATERCOURSE.

SALE.

See CONTRACT, 2; GRAVEL ROAD, 6 to 9; PRINCIPAL AND AGENT, 5, 6; PROMISSORY NOTE, 2; REAL ESTATE; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6; SHERIFF'S SALE; TAXES, 1 to 4, 6 to 12.

1. *Payment in Void Securities.*—Where a sale is for cash, and securities which are void, or prove to be void, are taken in payment, the creditor may sue and recover on the original cause of action. *School Town of Monticello v. Grant*, 168
2. *Same.—Question for Jury.—Weight of Evidence.*—Whether a given transaction, in a controverted case, constitutes a payment, is a question for the jury, and its verdict will not be disturbed on the weight of the evidence. *Ib.*

SCHOOLS.

See COUNTY SUPERINTENDENT.

SECRET SOCIETY.

See INSURANCE.

SET-OFF.

See EXEMPTION, 2; PROMISSORY NOTE, 4, 9.

SHERIFF.

See COUNTY COMMISSIONERS, 4; JUDGMENT, 9.

SHERIFF'S SALE.

See DEED, 1; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6; TAXES, 4.

Position of Purchaser.—A purchaser at a sheriff's sale occupies the same position as if he had purchased the property from the debtor at the same date as that on which the judgment was rendered.

Wright v. Tichenor, 185

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 2, 3.

SIGNATURE.

See MARRIED WOMAN, 2.

SLANDER.

1. *Pleading.—Evidence.*—In an action for slander, where it is alleged that the defendant slandered the plaintiff by charging that he swore to a lie while testifying as a witness in a case theretofore tried, it is competent for the defendant to prove, under the general issue, what the plaintiff testified to as a witness on such trial, because such evidence shows the character of the transaction to which the alleged slanderous words referred. *Berry v. Massey, 486*
2. *Same.—Knowledge of Hearers.*—Where the persons who hear a charge made against another know that a particular transaction is referred to, and know also that the transaction was not such as constituted a crime, no action for slander can be maintained. *Ib.*
3. *Same.—Instruction.*—Where the slanderous words complained of charge the plaintiff in an action for slander with having committed perjury, in testimony given in a case theretofore tried, and where the plaintiff's testimony in such case, as put in evidence, shows that he testified to certain things, and afterwards during the progress of the case corrected his testimony, stating that he was mistaken in his former statements, an instruction by the court, to the effect that if the alleged slanderous words spoken referred to such testimony, including the correction thereof, the verdict should be for the defendant, is erroneous. *Ib.*
4. *Open and Close.—Argumentative Denial Pro Tanto.*—The plaintiff in an action for slander, in which only an argumentative denial *pro tanto* of the complaint has been filed, is entitled to open and close the case to the jury. *Shulze v. McWilliams, 512*

SPECIAL FINDING.

See PRACTICE, 4, 7; REAL ESTATE, 7.

1. *General Verdict.—Judgment Non Obstante.*—All reasonable presumptions are indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings; and where the facts specially found by the jury, construed together, are not inconsistent, but may, upon any hypothesis, be reconciled, with the general verdict, the latter must stand. *Baltimore, etc., R. R. Co. v. Rowan, 88*
2. *Must Show Interest of Party to Action.*—Where a special finding fails to show that a party, either personally or in a representative capacity, has any interest in the subject of the action, such party can not complain of alleged errors in the conclusions of law. *Hedges v. Keller, 479*

3. *Silence as to Material Fact.—Presumption.*—Where a special finding is silent as to a fact, the existence of which is necessary to make out the plaintiff's case, the presumption will be that such fact did not exist. *Cincinnati, etc., R. W. Co. v. Gaines, 526*

SPECIAL PROCEEDINGS.

See CHANGE OF VENUE, 2, 4; DIVORCE; DRAINAGE, 7.

STATUTE.

See AFFRAY; BILL OF EXCEPTIONS, 1, 4; CHANGE OF VENUE, 1, 4; CONTRACT, 1, 2; COUNTY COMMISSIONERS, 2, 5, 6; CRIMINAL LAW, 1, 3, 21, 41; DECEDENTS' ESTATES, 1, 2, 4; DIVORCE; DRAINAGE, 3, 4, 8, 12, 13, 15 to 18; EXEMPTION, 1, 3; GRAVEL ROAD, 1, 2, 5, 6; HABEAS CORPUS, 1; INSANE PERSON, 1; JUDGMENT, 1, 9; NEW TRIAL; PLEADING, 6; PRACTICE, 3; PRINCIPAL AND AGENT, 13; PROMISSORY NOTE, 6; STATUTE OF FRAUDS, 1; TAXES, 1, 5, 8, 9; TOWN.

1. *Statutory Right.—Mode of Enforcing.*—Where a statute creates a new right, and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all others. *Storrs v. Stevens, 46*
2. *Rule of Construction.*—In construing statutes, the prime object is to ascertain and carry out the purpose and intent of the Legislature, and, in so doing, the words of a statute will be given their literal and ordinary signification; but if such a construction renders the meaning of a whole statute doubtful, or leads to contradictions or absurd results, the whole statute must be looked to, and the intent, as collected therefrom, will prevail over the literal import of terms and detached clauses and phrases. *Ib.*
3. *Pleading.—Private Statute.*—Private statutes must be pleaded, as the courts do not take judicial knowledge of them. *Crawfordsville, etc., T. P. Co. v. Fletcher, 97*
4. *Rule of Construction.*—In construing a statute, courts will look to all parts of the same statute, to other statutes, and to the general principles of law, and assign such meaning to the words of the statute construed as will make them all effective, unless by so doing the purpose of the Legislature will be defeated. *Ib.*

STATUTE CONSTRUED.

See ANIMALS, 1; CONTRACT, 2; CRIMINAL LAW, 41; GRAVEL ROAD, 2; STATUTE, 2, 4; TOWN.

STATUTE OF FRAUDS.

See CONTRACT.

1. *Parol Representations as to Credit of Another.*—Parol representations concerning the character, conduct, credit, ability, trade or dealings of any other person, by one not a party to the transaction, with the intent that such other person shall obtain credit thereby, are within section 6 of the statute of frauds, the same being section 4909, R. S. 1881. *Cook v. Churchman, 141*
2. *Same.—Conspiracy.*—Such representations, made by one so situate for the purpose of enabling another to obtain credit, are equally within the statute, whether made as the result of a conspiracy or not. *Ib.*
3. *Same.—Fraudulent Representations Advantageous to Maker.*—Such representations are none the less within the statute for having been fraudulently made, with an expectation that some incidental advantage might flow to the person making them from the credit induced thereby. *Ib.*
4. *Same.—Representations as to Particular Property and Assets of Another.*—Parol representations concerning the particular property and assets of

another, made with a view to establish the general credit and pecuniary ability of the other, are also within the statute. *Ib.*

STATUTE OF LIMITATIONS.

See CRIMINAL LAW, 20; PLEADING, 2; REAL ESTATE, ACTION TO RECOVER, 1, 2, 6; WATERCOURSE, 2.

SUBMISSION OF CAUSES.

See SUPREME COURT, 3.

SUBROGATION.

Volunteer.—Payment of Claim.—Payment of a claim may be made by a third person; and where a claim is paid by a third person who has no existing interest in the matter, such payment is an extinguishment of the claim, and such person is a mere volunteer, and not entitled to subrogation. *Binford v. Adams, 41*

SUPREME COURT.

See APPEAL; BILL OF EXCEPTIONS; CRIMINAL LAW, 23, 32, 42; DECEDENTS' ESTATES, 3; DRAINAGE, 19; INSTRUCTIONS TO JURY, 2, 3; MALICIOUS PROSECUTION, 1.

1. *Practice.—When Defective Complaint Cured by Judgment.—Supreme Court.*—Where the defects in a complaint are such as may be obviated by evidence on the trial, they will be held cured by the finding and judgment, when questioned for the first time by an assignment of error in the Supreme Court. *Burkett v. Holman, 6*
2. *Instructions to Jury.—Presumptions when Evidence not in Record.*—Where the evidence is not in the record, a judgment will not be reversed on account of instructions given, if they would have been correct under any supposable state of the evidence under the issues. In such case, also, it will be presumed that instructions refused were not applicable to the case made. *Baltimore, etc., R. R. Co. v. Rowan, 88*
3. *Submission by Agreement.—Dismissal of Appeal.—Notice to Co-parties.*—Where, on appeal, a cause is submitted by agreement, a motion to dismiss on the ground that notice of the appeal has not been given to co-parties, comes too late to be available. *Burk v. Simonson, 173*
4. *Same.—Defects in Pleading Supplied by Evidence.—Presumption.*—Where the defects in a pleading are of a character which could be supplied by the evidence and cured by the verdict, the Supreme Court will presume, in the absence of the evidence from the record, that such defects were so supplied and cured. *Brown v. Searle, 218*
5. *Pleading.—Consideration of Ruling on Demurrer.—Evidence.*—Where a demurrer is filed to a complaint and overruled, the ruling must be considered upon its own merits, without regard to the evidence. *Pennsylvania Co. v. Marion, 239*
6. *Conclusiveness of Judgment.*—The judgment of the Supreme Court on appeal, as to all questions necessarily involved in the conclusion reached, rules the case throughout all its subsequent stages, and upon such questions it is conclusive upon the parties and those in privity with them. *Forgerson v. Smith, 246*
7. *Same.—New Parties.*—The fact that a new party comes into the case, over the objection of the other party, does not change the rule, as he will be considered to have elected to abide by the result of the case as if he had been in from the beginning. *Ib.*
8. *Pleading.—Complaint on Promissory Note.—Defect in, Cured by Exhibit.—Assignment of Error.*—When questioned first by an assignment of error, a complaint on a promissory note, which fails to aver that the note was due when the action was commenced, will be deemed cured when the copy filed with the complaint shows such fact. *West v. Hayes, 251*

9. *Erroneous Instruction, if Harmless, will not Authorize Reversal.*—A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that such instruction did not influence the jury in making their verdict.
Cleveland, etc., R. R. Co. v. Newell, 264
10. *Assignment of Error.*—The Supreme Court will not consider any question which is not fairly presented by the assignment of errors.
State, ex rel., v. Faurote, 287
11. *Supersedeas Brief.*—*Discussing Questions Arising in Record*—Where appellant, in his *supersedeas* brief, not only points out the error or errors upon which he relies, as required by rule 16 of the Supreme Court, but also discusses the questions arising thereon fully and elaborately, he is entitled to have such questions, if properly saved and presented by the record, considered and decided without filing an additional brief.
Louisville, etc., R. W. Co. v. Grantham, 353
12. *Bill of Exceptions.*—*Omission of Evidence.*—Where a bill of exceptions, purporting to contain all the evidence given in a cause, shows on its face that it does not, the Supreme Court will not consider or decide any question which depends for its decision upon the evidence. *Id.*
13. *Instructions to Jury.*—Where the evidence is not in the record, the Supreme Court will not reverse a judgment on account of instructions given to the jury, unless they are so radically wrong as not to apply to any supposed case which might have been made by the evidence.
Johnson v. Breedlove, 521
14. *Unavailable Error.*—*Practice.*—Where it affirmatively appears that the judgment rests on a good paragraph of complaint, it will not be reversed because of an error in overruling a demurrer to a bad paragraph.
Cincinnati, etc., R. W. Co. v. Gaines, 526

SURETY.

See MARRIED WOMAN, 1; PLEADING, 15; PRINCIPAL AND SURETY.

TAXES.

See COUNTY COMMISSIONERS, 9; DRAINAGE, 1; EVIDENCE, 31; GRAVEL ROAD, 6 to 9; TOWN.

1. *Insufficient Description in Tax Deed.*—*Purchaser's Right to Enforce Lien on Land.*—A lien for the amount paid at a tax sale and for subsequent taxes may be enforced against the land by the purchaser, where by mistake the land is erroneously and insufficiently described in his deed, except in the cases provided in sections 6487, 6488, R. S. 1881, and sections 6496, 6497, R. S. 1881, as amended by the act of 1883, Acts 1883, p. 95.
Scott v. Millikan, 75
2. *Same.*—*Action to Enforce Lien, when Brought.*—*Premature Execution of Deed.*—In such case, a purchaser at such a sale may, after the expiration of the two years allowed for redemption, maintain an action to enforce a lien for the amount paid; and the fact that the county auditor executed a deed to such purchaser a year before the expiration of the time allowed for redemption, will not prevent the enforcement of the lien, such deed being on that account and by reason of the imperfect description invalid and ineffectual to convey title. *Id.*
3. *Same.*—*Burden of Issue and Proof.*—In such case, the burden is not upon the plaintiff either to allege or prove that the land was liable to taxation, that it had been assessed, that the taxes were unpaid at the time of the sale, or that there had not been a redemption from the sale, as in all these matters the burden is upon the party resisting the enforcement of the lien to show the contrary. *Id.*
4. *Lien for Taxes Paid while Holding Title.*—*Volunteer.*—One who, while holding the title to real estate under a sheriff's sale, redeems it from

a tax sale, and also pays other taxes thereon, may, where such sheriff's sale is set aside, enforce a lien for the taxes paid, as he can not be deemed a volunteer. *Harlan v. Jones, 167*

5. *Repair of Free Turnpikes.—City of Evansville.—Exemption in Charter from Road Tax.*—Clause 39 of section 30 of the city charter of Evansville (Local L. 1847, p. 3), which provides that no property within said city shall be taxed for the purpose of making or repairing any road outside the city limits, gives an exemption only from the ordinary road tax, and not from a tax levied for the purpose of keeping free turnpikes in repair, as the latter class of roads was not contemplated at the time of the enactment of such charter. *Read v. Yeager, 195*
6. *Deed.—Void Sale.—State's Lien.*—The holder of the auditor's tax deed is entitled to enforce the State's lien, even if the sale is void, except where it is invalid for the causes enumerated in section 6495, R. S. 1881. *Culbertson v. Munson, 451*
7. *Same.—Enforcement of Lien.—Contract.—Agency.*—Mere representations by the vendee of a tax claim to the vendor, that he purchases it in the interest of the owner of the land, and thereby secures it at a reduction on the sum due, will not, in the absence of an agency or an agreement that the owner is to have the benefit of the reduction, prevent him from enforcing the lien for the full amount due. *Id.*
8. *Same.—Interest.—Act of March 5, 1883.*—Under sections 3 and 4 of the act of March 5th, 1883, the purchaser at a tax sale, whether made before or after the taking effect of such act, is only entitled to interest at the rate of twenty per cent. *Id.*
9. *Personal Property.—Redemption.—Act Repealed.*—The act of March 13th, 1875, providing for the redemption of personal property sold for taxes, was repealed by the act of March 29th, 1881, concerning taxation, which makes no provision for redemption from such sales. *Hadley v. Musselman, 459*
10. *Same.—Bailment.—Purchase at Tax Sale of Bailed Property by Bailee.*—A bailee for hire, in possession, who is under no contract or duty to pay the taxes on the property bailed, may buy the same at a sale for taxes. *Id.*
11. *Same.—Sale on Christmas Day Valid.*—A sale of property for taxes made on Christmas day is valid. *Id.*
12. *Lien for City Tax Paid by Purchaser.*—Where one who has purchased real estate at a tax sale for non-payment of State and county taxes, afterwards pays the city tax on such property, he may, in a suit to quiet title, have the same allowed and decreed a lien on the real estate as part of the original claim for the purchase-price. *Millikan v. Ham, 498*

TELEGRAPH COMPANY.

Rule Requiring Transient Person Sending Messages to Deposit Money for Answer.—A rule of a telegraph company, that transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words, is reasonable and valid, and the company may, without liability, refuse to transmit a message until the deposit to pay for the answer is so made. *Western U. Tel. Co. v. McGuire, 139*

TENDER.

See GRAVEL ROAD, 8, 9.

Promissory Note.—Attorney's Fees.—Answer.—To a complaint on a promissory note an answer to so much of it as seeks to enforce a stipulation for attorney's fees, averring a tender of the principal and interest due on the note, but failing to state the amount due at the date of the tender, and that the sum tendered was in lawful money, and not

showing that such sum had been brought into court for the plaintiff,
is bad on demurrer. *Goss v. Bowen*, 207

TITLE.

See DEED; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER;
TOWNSHIP TRUSTEE, 1.

TORT.

See COUNTY SUPERINTENDENT, 2, 3; MALICIOUS PROSECUTION.

TOWN.

1. *Taxes.—Time of Levy.—Statute Construed.—Amendment by Implication.*—Section 3348, R. S. 1881, in force since August 17th, 1855, requiring the board of trustees of an incorporated town to determine the amount of general tax for the year before the third Tuesday in May, is amended by implication by section 3262, R. S. 1881, in force since March 10th, 1879, and such tax may be determined within a reasonable time after the adjournment of the county board of equalization. See sections 6389 and 6398, R. S. 1881.

Kralli v. Larrew, 363

2. *Same.*—The words “determine the amount of general tax for the current year,” as used in section 3348, R. S. 1881, mean the final determination of the board as to the amount, assessment and levy. *Id.*

TOWNSHIP TRUSTEE.

See COUNTY COMMISSIONERS, 2, 3.

1. *Title to Money of Township.—Administrator.*—The title of a township trustee in the money for which he is held accountable is a legal title only in a technical and limited sense, the money really belonging to the township; and upon his death while in office the same limited title is transmitted to his administrator. *Rowley v. Fair*, 189
2. *Same.—Payment by Administrator of Deceased Trustee to Latter's Successor.—Conversion.—Identification.*—It is the duty of the administrator of a deceased township trustee to deliver over such money, so far as the same can be identified, to the successor of such trustee; but when the money has been so far converted by the trustee as to render its identification as the property of the township impracticable, no such duty exists, except in the payment of an allowance regularly made against the estate. *Id.*
3. *Power to Employ Physician for Poor.*—Where the physician employed by the county refuses to treat a poor person who is in urgent need of medical attention, the township trustee has authority to employ another physician. *Washburn v. Board*, etc., 321
4. *Same.—Evidence.—Declarations of Trustee as to Payment.*—In an action against the county by a physician employed by a township trustee to treat one in need of immediate attention, the declarations of the trustee concerning payment for services so rendered are admissible in evidence. *Id.*

TRESPASS.

See ANIMALS; CRIMINAL LAW, 4.

TRIAL.

See DRAINAGE, 7, 8, 12.

TRUST AND TRUSTEE.

See DECEDENTS' ESTATES, 6, 9; PRINCIPAL AND AGENT, 2 to 4, 13; REAL ESTATE, 7; TOWNSHIP TRUSTEE.

TURNPIKE.

See GRAVEL ROAD; TAXES, 5.

VENDOR AND PURCHASER.

See DEED; GRAVEL ROAD, 7; MARRIED WOMAN, 3; NOVATION; PERSONAL PROPERTY; PRINCIPAL AND AGENT, 3 to 9; REAL ESTATE; REAL ESTATE, ACTION TO RECOVER, 2 to 4, 6; SHERIFF'S SALE; TAXES, 7.

VENIRE DE NOVO.

See PRACTICE, 15, 16.

VENUE.

See CHANGE OF VENUE; CRIMINAL LAW, 24.

VERDICT.

See INSTRUCTIONS TO JURY, 1; INSANE PERSON, 3; PRACTICE, 3, 4, 7; SPECIAL FINDING, 1.

VERIFICATION.

See DRAINAGE, 18.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

VOLUNTEER.

See SUBROGATION; TAXES, 4.

WAIVER.

See BAILMENT, 3; CHANGE OF VENUE, 3; JURISDICTION, 3.

WARRANTY.

See LANDLORD AND TENANT; REAL ESTATE, 4.

WATERCOURSE.

See CITY, 2; DRAINAGE, 3, 11

1. *Change of Channel.—Riparian Owner.—Acquiescence.—Estoppel.—Presumption.*—Where a change is made in the flow of a natural watercourse, either artificially or otherwise, and riparian owners acquiesce in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, and precludes a restoration of the stream and its surroundings to their original condition. *Burk v. Simonson, 173*
2. *Same.—Canal.—Right of Way.—Eminent Domain.—Benefits and Damages.—Presumption.—Statute of Limitations.*—Where land is taken for a right of way for a canal under condemnation proceedings for that purpose, it will be presumed that all direct benefits to the owner were included in the assessment of damages; and where the canal company constructs embankments and structures which protect a riparian owner's land from overflow, and maintains them for such a period of time as to permit the running of the statute of limitations, it will be presumed that the acquiescence of the owner of the fee was due in part to the benefit which accrued to his land from such embankments and structures, and that all the damages were assessed and paid. *Ib.*
3. *Same.—Abandonment of Canal.—Rights of Riparian Owner.*—In such case the abandonment of the canal will not divest the owner of the fee of his right to have the embankments and other structures maintained permanently for the protection of his land. *Ib.*
4. *Same.—Injunction.—State of Stream.*—Where a person is undertaking to destroy an existing watercourse, or to wrongfully change the existing state of the stream, so as to materially injure another's land, the latter is entitled to an injunction. *Ib.*

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WITNESS.

See CRIMINAL LAW, 7, 8, 21, 26, 28; DECEDENTS' ESTATES, 1, 2, 11; EVIDENCE; PRACTICE, 5.

Contradictory Statements.—Expressions of opinion out of court different from that on the witness stand may be proved as affecting the credibility of the witness. *Cochran v. Amaden, 282*

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See CHANGE OF VENUE, 2, 4; DIVORCE, 2; INSURANCE, 2; PLEADING, 12; TOWN, 2.

WRITTEN INSTRUMENT.

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END OF VOL. 104.

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